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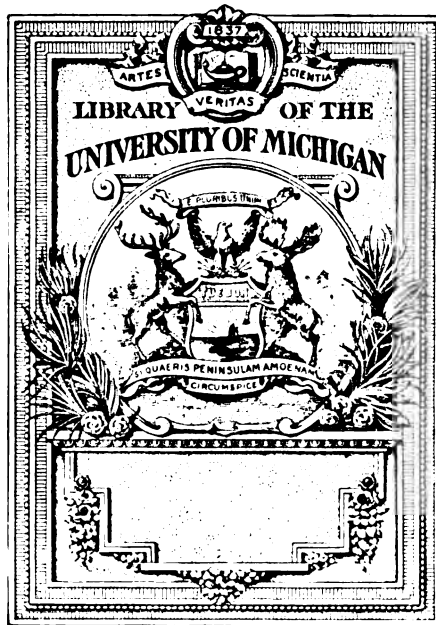
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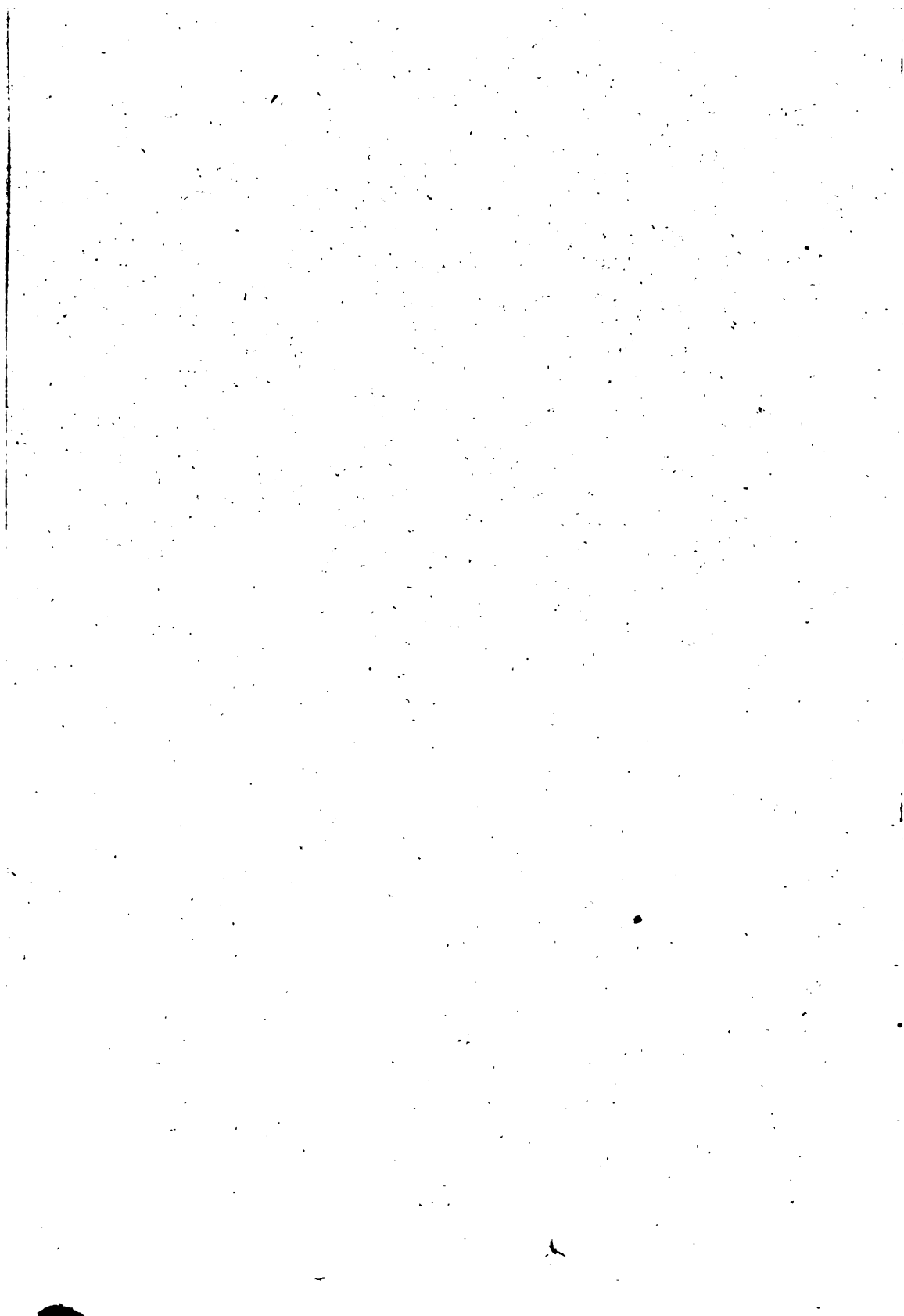
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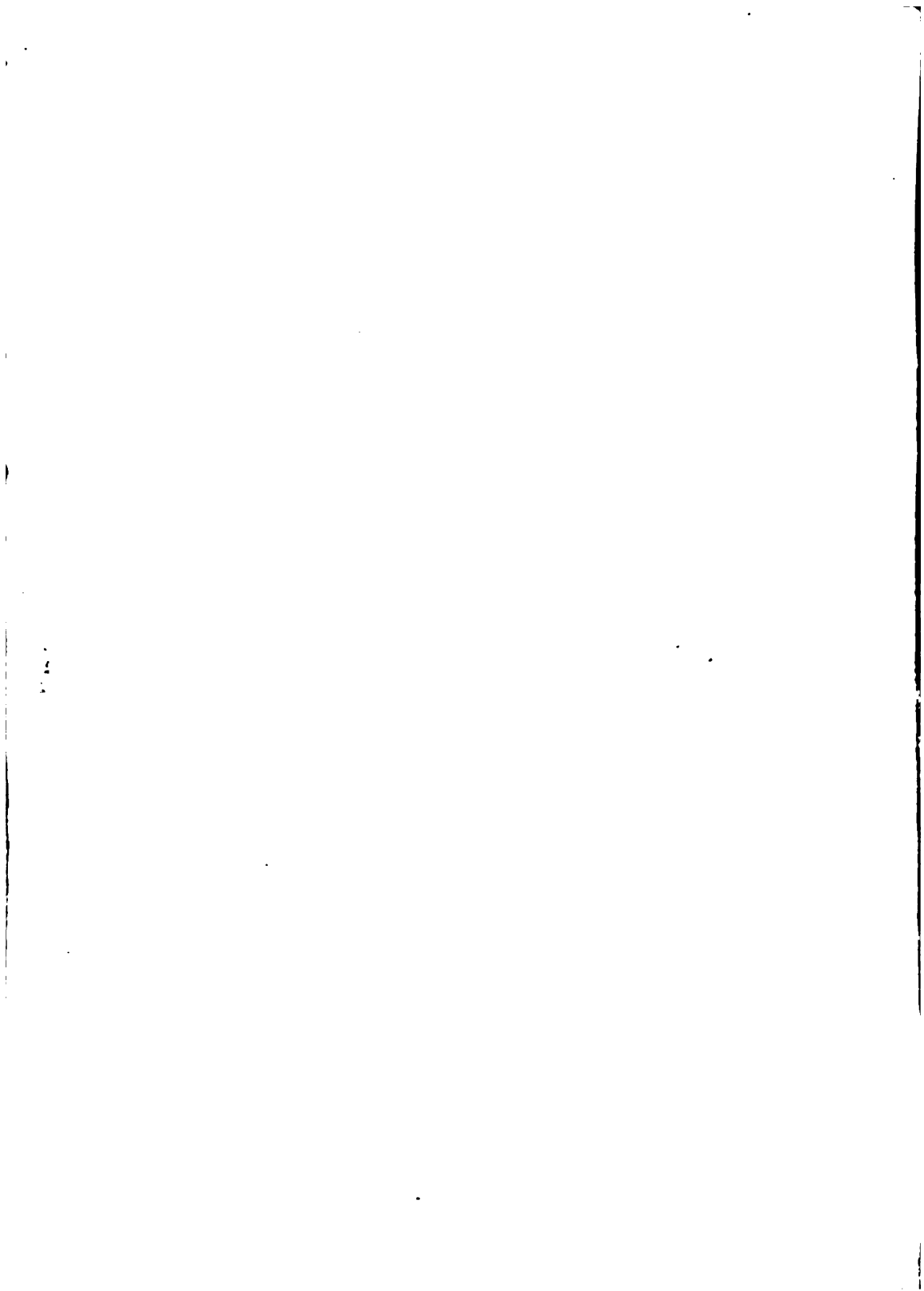
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# **JOHN MARSHALL**

## **LIFE, CHARACTER AND JUDICIAL SERVICES**

**As Portrayed in the Centenary and Memorial Addresses and Proceedings Throughout the United States on Marshall Day, 1901, and in the Classic Orations of Binney, Story, Phelps, Waite and Rawle**

**Compiled and Edited with an Introduction**

**By**

**JOHN F. DILLON**

**ILLUSTRATED WITH PORTRAITS AND FACSIMILES**

**IN THREE VOLUMES**

**VOLUME I**

**CHICAGO  
CALLAGHAN & COMPANY  
1903**

**ST. MEMIN PORTRAIT.  
From Kieckhefer's Reproduction.**

## Commemorative Proceedings and Addresses—con.

	Vol.	Page.
OHIO .....	II	218
OREGON.....	III	212
PENNSYLVANIA.....	I	439
RHODE ISLAND.....	I	279
SOUTH CAROLINA .....	II	92
SOUTH DAKOTA .....	III	145
TENNESSEE.....	II	190
VIRGINIA ....	I	43
WASHINGTON .....	III	249
WEST VIRGINIA.....	II	42
WISCONSIN.....	II	412
EULOGY OF HORACE BINNEY.....	III	281
EULOGY OF MR. JUSTICE STORY.....	III	327
ADDRESS OF EDWARD J. PHELPS .....	III	381
ADDRESS OF CHIEF JUSTICE WAITE .....	III	403
ORATION OF WILLIAM HENRY RAWLE .....	III	406
RESOLUTIONS OF BAR ASSOCIATION OF PHILADEL- PHIA, 1831.....	III	430
ADDRESS OF NATIONAL COMMITTEE OF AMERICAN BAR ASSOCIATION ON JOHN MARSHALL DAY...	III	434
TABLE OF CASES .....	III	439
INDEX TO THE WORK. ....	III	445

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ANNOUNCEMENT BY PUBLISHERS.

The publishers have arranged to issue uniform with the present work an edition of Marshall's constitutional decisions and writings annotated, with the assistance of the present Editor, by George S. Clay and John M. Dillon of the New York Bar.

## ILLUSTRATIONS, VOL. I.—EXPLANATORY NOTES.

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### PORTRAIT OF MARSHALL - - *Frontispiece*

The portrait of the Chief Justice, frontispiece of the present volume, is from a crayon by the celebrated French artist St. Mémin, made in March, 1808, when Marshall was in the fifty-third year of his age, that is, about six years after his appointment as Chief Justice. Chrétien, another French artist, had in 1786 invented an instrument called the "physionotrace," by means of which a profile outline of a face in figure and dimensions could be taken with the utmost precision, and St. Mémin had constructed such an instrument for himself, filling in the outline, as in this instance, with crayon, generally black on a pink background. He visited the United States and executed hundreds of portraits. The original of Chief Justice Marshall, of which the frontispiece engraving by Klackner is a copy, is now owned by Mr. Thomas Marshall Smith, of Baltimore, whose mother was a daughter of the Chief Justice's eldest son. The portrait is the only one of Marshall at that age, has always remained in the family, and is regarded by them as an excellent likeness. Of the present engraving after that portrait, made from the reproduction by Mr. Klackner of New York, Mr. Smith says that "it is in every respect most satisfactory." Portraits of the Chief Justice later in life are given in subsequent volumes of the present publication.

### OAK HILL HOME - - - *Page 210*

The second engraving in the present volume is the Oak Hill home of the Chief Justice, concerning which Mr. Thomas Marshall Smith, in a letter which he obligingly wrote to the Editor, says: "The father of the Chief Justice in 1765 moved to Fauquier county, and in 1778 purchased 'Oak Hill,' or 'The Oaks.' Here he built a frame house, which is the wing on the right in the picture. The main building was added in 1821, by Thomas Marshall, the eldest son of

the Chief Justice. It was at Oak Hill that the future Chief Justice spent most of his boyhood, and in it commenced at eighteen the study of the law from the first completed edition of Blackstone, then recently published, and which tradition says was imported by the father for the son's use. It was from Oak Hill that the son walked twenty miles to drill the Company his father had organized, afterwards known as the 'Culpeper Minute Men.' The house still exists as shown in the picture. The estate has changed hands several times since it was owned by the family; the present owner keeps the same in good repair."

The present engraving is from an oil painting which Mr. Thomas Marshall Smith says "gives a better idea of the country home of the Chief Justice than anything we know of. My mother, who was born at Oak Hill and spent most of her life there, says the picture hung over the mantel-piece in the parlor many years, and that the engraving recalls the old place very vividly. The house at Germantown, in Fauquier county, where the Chief Justice was born, was destroyed a number of years ago." A plate of the Richmond home of the Chief Justice illustrates a subsequent volume of the present work.

FACSIMILE OF LETTER OF THE CHIEF JUSTICE  
TO RICHARD PETERS - - - Page 470

We give in *facsimile* an interesting original letter written by Marshall when he was Secretary of State, October 30, 1800, that is the October preceding his appointment as Chief Justice, courteously furnished to the editor by Mr. Edward C. Perkins of the New York Bar, who stated that the original was given to his grandmother, Mrs. M. A. D. Bruen, by Mrs. John Field, of Philadelphia, who was a descendant of Judge Peters, to whom the letter was addressed. The letter is intrinsically interesting, is characteristic of Marshall, and contains a touch of humor where he says: "I pray devoutly (which is no very common practice with me) that the future administration [Mr. Jefferson's] may do as little harm as the present and the past."

## INTRODUCTION.

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- Section I. Plan, scope and purpose of the present work.
- II. The origin and first commemoration of Marshall Day.  
Order of publication of the proceedings and addressees.
- III. Marshall's influence in establishing the principle of nationality in the Constitution.
- IV. Final ascendancy and universal acceptance of Marshall's principle of nationality.
- V. Marshall's influence in establishing the constitutional authority and functions of the Supreme Court, and in securing for it public respect and confidence.
- VI. The salutary operation of the power of the judiciary as held in Marbury's Case to declare void legislative acts in conflict with the Constitution demonstrated by experience.
- VII. No part of Marshall's opinion in Marbury's Case is *obiter* or extra-judicial.
- VIII. Marshall's rulings on the Burr trials awarding subpoenas directed to President Jefferson reviewed and approved.
- IX. Marshall's personal life and character.

### I.

My relation as Editor of these volumes came about in almost an accidental way. A distinguished Justice of the Supreme Court of the United States<sup>1</sup> concluded a letter acknowledging a copy of my Albany Address by

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<sup>1</sup> Mr. Justice Shiras.



saying: "A collection of the addresses delivered on John Marshall Day, if put in a permanent form, would, I think, be very interesting as showing a consensus of opinion concerning Marshall on the part of eminent lawyers in all parts of the country." Just after the receipt of the letter it chanced that I had occasion to write to the publishers of this work, and I inclosed the letter of the learned Justice and asked them to undertake the publication, even though the enterprise might prove unprofitable. With characteristic liberality they acceded to the proposal, annexing the single condition that I should collect, arrange and edit the addresses, with a suitable Introduction. Having suggested that they should make any pecuniary sacrifice which the publication might involve, I felt estopped to make the objection, however well founded, of want of time. And so I consented. Only those who are familiar with such work can appreciate how much time it has required; but it has been for me a labor of love, carrying with it its own exceeding great reward,—perhaps the last instalment, small enough at the best—the widow's mite—that I shall be able to pay on the inextinguishable debt that every lawyer owes to his profession, the basis of the obligation being that he is a member of a perpetual body of men, and therefore an inheritor of all the accumulated treasures of the past.

Through correspondence with the various bar associations and institutions of learning it appeared that the day

was publicly commemorated, not only at the National Capital, but in thirty-seven States and Territories of the Union. In the few States in which the day was not formally observed, the omission was due to accidental causes. In several of the States there were celebrations at different places. It was found that more than fifty orations, not counting minor ones, were given by leaders of the bar, by members of the highest Federal and State courts, and by eminent statesmen and scholars. "Such honors Ilion to her hero paid." How to deal with such a mass of material was the cause of no little embarrassment. Should I undertake the invidious office of selecting a dozen or twenty, to the end that their publication might be comprised in a single volume? Such a curtailment of this truly national event, the most remarkable voluntary, spontaneous tribute in its extent and character, which, in the history of our profession, in any country or in any age, was ever paid to the name and memory of a judge long since deceased — was not for a moment to be thought of if it was possible to avoid it. Moreover, an examination of the addresses showed such a general high order of excellence and varied ability that to make a just selection would be an ungracious and difficult if not impossible task.

The publishers concurred in the view that the publication ought to reflect the unique occasion in all its amplitude. And accordingly what was at first thought could

be compassed in one or at most two volumes has taken three; but we have the satisfaction of presenting a record of the great event, substantially complete and undismembered.

The principal official addresses have as a rule and wherever practicable been given in full, and nothing has been omitted from any except repetitions of biographical matter, of extracts from accessible volumes, and of details not connected with Marshall's judicial services, for it was Marshall's judicial services which chiefly gave to the day its inspiration and essential character. One other word in explanation, and, if need be, in vindication of the plan adopted: While the same great judgments of Marshall construing the Constitution, delimiting its boundaries and settling its most vital and fundamental principles, have necessarily passed under the review of the speakers, yet these decisions are discussed from such different points of view, or with such different objects, and in such different styles, that there is an unfailing variety which the interested reader will be sure to perceive and enjoy. This is so marked that it may with truth be said that the addresses, though running on the same general lines, could have been delivered to the same audience, and it would have found in each address something new in thought, expression, suggestion or purpose.

## II.

The history of the movement leading to the institution and the first centennial commemoration of Marshall Day appears so fully in these volumes as to render extended reference to it unnecessary. The suggestion by Mr. Adolph Moses of the Chicago Bar of such a day struck a sympathetic chord which vibrated throughout the land. It was indorsed by the Bar Association of Illinois, and met with the hearty and weighty sanction of the American Bar Association. This body assumed the charge and direction of the celebration, and thus assured its success on a national scale. To this end it appointed a Committee composed of one member from each State and Territory and from the District of Columbia. In suitable and earnest words this Committee publicly addressed the Bench and Bar of the United States, setting forth the reasons why the whole country should commemorate the centennial of the installation of the Chief Justice, and urging upon the State and National Courts, the State, City and other Bar Associations, the Universities and institutions of learning and public bodies throughout the land the due observance of the day.<sup>1</sup> At the Committee's instance President McKinley recommended to Congress the propriety of a fitting celebration of the occasion on the part of all the departments of the gov-

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<sup>1</sup>The text of this excellent address and also the names of the members of the National Committee are given in the Appendix.

ernment. Congress approved; and in the hall of the House of Representatives impressive national ceremonies were held, the account of which is given the first place in these volumes. The next place is appropriately assigned to the proceedings in the Commonwealth of Virginia, Marshall's native State. The other observances are arranged in the order of the nine Federal Judicial Circuits, commencing with the State of Maine in the First Circuit.

In addition to the addresses on Marshall Day, the eulogies of Mr. Binney and Justice Story delivered in 1835 soon after the death of the Chief Justice; the address of Mr. Phelps before the American Bar Association at its annual meeting in 1879; of Chief Justice Waite and the oration of Mr. Rawle in 1884 at the unveiling of the statue of Marshall in the Capitol grounds in Washington, have been included. These productions are famous, have long been justly regarded as classic, and are somewhat rare or inaccessible. They round out and complete the plan and purpose, and give a distinctly added value to the present publication.

### III.

The influence of the universal celebration of the day will not cease with the occasion, but will be wide and lasting. It has taught the people at large what before was chiefly known to lawyers and special students of our

history, and to these often imperfectly, that to Marshall more than to any other person is due the establishment of the principle of nationality in the Constitution of our country. This principle has profoundly affected our national life. It has determined our destiny. It has made us a Nation in fact as well as in name, a power and not a mere painted semblance. It held the Nation intact against the heresies of nullification and secession. It received its complete, final and now unquestioned triumph with the overthrow of the Confederacy, whose forces, as has been said, surrendered not more truly to Grant in the field than to Marshall's great judgments expounding the Constitution. Marshall's career has been revealed in a wider light to the whole country; and the value and influence of his work are felt more distinctly, more impressively than ever before.

Our reverence and gratitude are consciously enhanced when it is seen that his decisions as to the scope of the national authority were opposed by powerful parties and interests. Many lawyers and statesmen differed from Marshall at the time. Moreover, the questions were novel and so closely balanced that they not only might have been determined the other way, but it is certain that they would have been determined the other way if their decision had fallen to judges of the strict construction school. Next to Marshall's judicial genius the most conspicuous feature in his character is his placid and undaunted courage. No weak judge, no ordinary judge,

would have faced unmoved, as Marshall did, the active hostilities which he had to encounter. He knew no fear. He heeded no clamor. He kept on in the orbit of his duty, like the planets in their courses, silent and irresistible.

At the date of Marshall's appointment the Republic was "in the gristle" of its infancy and not yet hardened into bone of manhood; it was yet "mewing her mighty youth." He found the National Constitution weak, almost tottering; he supported it by his adamantine judgments, and he carried it with his strength and courage through the dangers that encompassed it.

The flexibility of the Constitution, arising out of the general language in which its powers and prohibitions are expressed, was the means of perfecting and probably of saving it. Marshall's long judicial reign, contemporary with the official terms of four Chief Justices of England, four Lord Chancellors, and the administration of six American Presidents, made possible the gradual development of the Constitution under his master mind by judicial decisions, point by point, bearing in this respect no slight analogy to the development of the common law, and giving as a result a system far wiser and better (because based upon experience and necessity) than any system which it would have been possible for the mind of man to have formulated in advance. And thus it has happened that Marshall's imprint is imperishably left upon all of the great and essential features of the Constitution.

## IV.

The proceedings here published exhibit in a striking light the unanimity of opinion in every part of the country (without a note of dissent in any quarter or from any party) as to the controlling influence and effect of Marshall's decisions in moulding the Constitution into the form, substantially, in which, aside from the recent amendments, we have it to-day. It is true that after the accession of his able successor and other changes in the *personnel* of the bench, there was in some respects, not fundamental, a slight reaction against the extreme centripetal tendency of Marshall's doctrines—a slight recession from Marshall's high-water line of nationality; but that was all. None of his great Constitutional decisions as to the rightful authority of the National Government was overruled; and the powers, limitations and prohibitions of the Constitution, as Marshall's judgments defined and construed them, remained, and they remain to the present day, not only untouched, but no longer questioned. —

The principle of nationality has not yet, as I think, reached its limit or culmination; and I venture to predict that by natural evolution, by judicial development and constitutional amendment arising out of our experience, necessities and changing conditions, the next Marshall Day centennial will witness the powers of the National Government extended to objects and purposes not now within its scope,—at least, its recognized scope.



To the thoughtful reader, amongst the most interesting features of the celebration is the estimation in which Marshall is held in the parts of the Union that clung longest to the doctrine of States' Rights and strict construction, and that made these the legal justification of the Civil War. The appreciation of Marshall is nowhere more hearty and unreserved than in the addresses delivered in those States on Marshall Day. This celebration also shows that the results of the Civil War are everywhere loyally accepted, and that all sections and all parties rejoice in a re-united country; and therefore we are not sorry to hear, in one or two of the addresses, a soldier or a judge of the Confederacy heave a natural sigh or utter a tender lament over the "Lost Cause."

Marshall in a famous opinion earnestly declared that the union of the States under the Constitution was intended by its framers to be perpetual. And surely the spontaneous and universal honors which were rendered to Marshall throughout the entire country more than sixty-five years after he had closed his earthly career afford the strongest assurance possible that the Republic, enthroned in the heart and affection of its people, is destined to endure throughout a future as boundless as our hopes.

#### V.

- In unfolding by successive judgments the powers of the General Government under the Constitution, Marshall was thereby rendering also a closely related and scarcely

less important service. This was the establishing of the importance and scope of the constitutional authority and functions of the Supreme Court, as the ordained tribunal peacefully to settle disputes concerning the respective powers and pretensions of the States and the Nation, and to determine finally, whenever presented for judicial decision, all controversies and cases arising under the Constitution and laws of the United States. How lowly in 1801 was the estate of the court in public and professional estimation is most fitly portrayed in many of the Marshall Day addresses. It is sufficient here to refer to the gloomy picture drawn by Jay in his letter declining the Chief Justiceship which Marshall shortly afterwards accepted. The court had failed in the past, Jay declares, to acquire the requisite "public confidence and respect." That was not all. The future appeared equally dark; for he says, "when I left the bench I was perfectly convinced that under a system so defective the court could not obtain the energy, weight and dignity which was essential to its affording due support to the National Government."

The court in 1801 was in a hostile climate. It was almost without friends. Hardly any so poor as to do it reverence. The Chief Justiceship went begging. No great lawyer wanted it. Marshall successively recommended two other persons, and sought not the place for himself. But from the time he took the helm of the court the unsteady vessel felt his firm hand in its every part and every

movement. With equal skill and courage, and with faith sublime in himself, he safely directed the constitutional course of the infant Republic for a third of a century, in storm and stress, in darkness and dangers, over uncharted and unvoyaged seas, towards unseen lands and an unknown destiny. "Before him lay a vast, untraveled gloom; behind, a wake of splendor."

And what a change Marshall wrought! The popular notions a century ago were deeply tinged with the doctrines and theories engendered by the French Revolution — the supreme and uncontrollable right of the people to govern. *Marbury's Case* opened a new chapter in the history of constitutional governments. That decision said to Congress, that is to the people's department, to the law-making power, "if you enact a law in conflict with the Constitution it is utterly void, and the court, although only a co-ordinate department, has the right under the Constitution so to decide, and such decision is authoritative and final, binding throughout the land upon States and people." But that decision also said to the head of one of the executive departments, acting under the immediate orders of the President, "You, too, are subject to the Constitution and are amenable to judicial authority whenever you deny or violate the legal rights of any individual, for be it known this is a Government of laws, and not of men." Verily a new charter of individual rights and liberties was here proclaimed.

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The decision was not relished. It was received with discontent. It alarmed the party in power. Jealousy of the Supreme Court on the part of the States had existed from the first, and now hostility to it was openly manifested. Intimidation by impeachment was resorted to. Attempts at different times were made in Congress looking to the amendment of the Constitution so as to make the judges removable on the address of two-thirds of both Houses, to change the judicial tenure from life to a fixed term of years, and to alter the Judiciary Act so as to deprive the Supreme Court of the power to examine or revise judgments of the State courts on Federal questions, no matter how conflicting or obviously erroneous such judgments might be. What kept the court afloat in this time of peril? More than anything else it was Marshall's judgments, and, above all, the plain, unanswerable, luminous reasoning by which they were accompanied and on which they rested.

The growth of the court in the public confidence and respect during the century intervening between Marshall's appointment and its centennial observances was signalized in a most impressive manner by one of those coincidences that often so powerfully affect the public mind. On Marshall Day, 1901, the Insular Cases, growing out of our acquisition of foreign possessions and involving their Constitutional status and the power of Congress and of the Executive in respect of them, had been

argued in the Supreme Court, but were still undetermined. The noticeable point is that not only was there no jealousy of the jurisdiction and power of the court on the part of the President, or Congress, or the people; but, on the contrary, these were all calmly awaiting the judgment of the court, to be accepted, of course, whatever it might be, as authoritative, and to be acted on accordingly by the Government and the people. This extraordinary spectacle of an expectant Nation waiting for the court's deliverance shows how fine and true, fine because true, is Mr. Bryce's statement in that great work which displays in its every part such a deep and clear insight into our political and legal institutions and their workings: "No other man did half so much as Marshall, either to develop the Constitution by expounding it, or to secure for the judiciary its rightful place in the Government as the living voice of the Constitution." And among the chief lessons of Marshall Day is the revelation of the public as well as the professional consciousness that the Supreme Court is, verily, the *living voice of the Constitution*; and that it is such is due pre-eminently to Chief Justice Marshall.

## VI.

It was inevitable that on Marshall Day renewed attention should be called to the original and distinctively American feature in our governmental polity which Jefferson called the "judicial veto." The definite establish-

ment of that principle may truly be said to date from Marshall's decision in *Marbury against Madison*. The nature and effects of this doctrine are discussed in a great variety of aspects in the addresses here published. That its workings with us have been satisfactory is demonstrable from our experience, and, indeed, is now nowhere controverted. Since the time when that principle was settled beyond question by the repeated decisions of the State and Federal courts, all of the States have framed new Constitutions, many of them more than once, and have amended their Constitutions as often as they thought best, new States have been admitted into the Union; and yet in none of the Constitutions, even the latest, has this power of the courts been denied or limited. The doctrine itself was established against earnest opposition; but opposition has long since disappeared. The only existing difference of opinion amongst us is that some persons think the courts exercise too freely the grave power to hold legislative acts unconstitutional, and others that they exercise this salutary power too sparingly. The remarkable fact to be noted is that there is an absolute agreement of opinion as to the soundness and utility of the principle itself. It is still more remarkable that notwithstanding our favorable experience with the practical operation of the "judicial veto" on such an extended scale, National and State, for a hundred years, its importance as a factor in the growth and development of

Constitutional Government seems to attract no considerable attention elsewhere; and in those countries having written Constitutions, the Australian Confederation excepted, the power is expressly reserved to the Legislature to decide finally upon the constitutionality of its enactments, and such a power is expressly denied to the courts.

Mr. Bryce, in a letter to the editor referring to Marshall Day, said: "You in the United States seem to be far more alive to the services rendered by your great legal and Constitutional luminaries than people are in England, where, I am sorry to say, not very many members of our Bar or Bench show much interest in the history of the development of the Constitution on its legal side; and one cannot doubt that this attention so given in America must have happy results on the ideals which ought to be cherished by the legal profession."

The judicial veto is the great original contribution of America to the science of Government. Whoever shall attentively consider its history from its immediate germ in the Colonial Charters and Colonial experience to its final establishment by the judgment in *Marbury's Case* will not fail to observe four striking facts, which I must content myself with stating without elaboration:

1. No express power is given in the Constitution to the Federal Judiciary in general or to the Supreme Court in particular, to declare void either acts of State Legisla-

tures or acts of Congress because they are in conflict with the Federal Constitution, or for any other reason. On this subject the Constitution is utterly silent.

2. State jealousies of Federal power were so strong that the States would probably have defeated the adoption of the Constitution if it had contained such an express provision.

3. So far from such power being conferred in terms upon the Federal Judiciary or the Supreme Court, the Constitution limits the function of the Federal courts to the usual and narrow one of deciding litigated cases. The courts can originate nothing, cannot call their own powers into action, and it depends, therefore, upon fortuitous circumstances, when, if ever, any particular question will arise, or, if it arises, whether those affected by it will resort to the judicial tribunals for relief or redress.

4. But herein consists, as it has turned out, the consummate wisdom of the Constitution. Whether in this its framers builded better than they knew, who can tell? But instead of erecting a separate tribunal whose distinct office is declared to be to guard the Constitution and to prevent the usurpation or exercise of unauthorized powers by the Executive or Congress, and to settle the respective powers of the States and the General Government, the Constitution left this authority in the courts, to result as an incident solely from the



exercise of the judicial function of determining litigated cases, namely cases arising under the Constitution, laws and treaties of the United States as provided in the Judiciary Article of the Constitution. Instead of the puerile device of placing the Constitution "under the guarantee of all the virtues," as France did, we in our Constitution gave the courts, in the indirect manner above pointed out, the power and made it their duty, but only at the instance of those adversely affected, to refuse to carry unconstitutional acts or legislation into effect. But since all executive action must be embodied in orders, and all legislative action in the form of written statutes, the door is at all times open for redress to all who are injured by unconstitutional acts or enactments; and thus the remedy, although indirect, is adequate and efficient. And albeit the decision of the Supreme Court only results in form in a judgment in the case of *A v. B*, yet the effect is that the principles of such judgment practically fix the meaning of the Constitution, for the strongest force in this country is the universal sentiment of legality and reverence for and obedience to law as declared by the judicial tribunals. In the end the decisions of the Supreme Court are submitted to, or, as has occasionally happened, the Constitution is legally amended in pursuance of provisions in that behalf therein contained. And thus the reign of law in this country is everywhere supreme.

## VII.

The addresses in these volumes disclose the striking fact that of Marshall's numerous Constitutional decisions only two are now seriously criticised, viz., certain parts of the opinion in *Marbury against Madison*, alleged to be *obiter*, and the awarding on the trial of Burr, at his instance, of a subpoena *duces tecum* directed to the President of the United States. As the questions thus raised belong to a critical estimate of Marshall's judicial character, or are intrinsically important in their Constitutional aspects, this and the next section of this Introduction will be devoted to some observations concerning them, which the non-professional reader may, if he pleases, omit, but which I have endeavored to state so that they may readily be understood by laymen.

It is admitted by all that the decision of the court in *Marbury against Madison* that an act of Congress in conflict with the Constitution is void was necessarily involved in the cause; and therefore this point was legitimately presented and decided. As that conclusion when applied to the case in hand had the effect to deprive the court of any jurisdiction to issue the *mandamus* whereby *Marbury* sought to compel *Madison*, the Secretary of State, to deliver to him his commission, the argument of Marshall's critics is that the court having in the end decided that it was without jurisdiction to issue this particular writ, it

had no right to consider, or to decide, or to express any opinion whatever upon the question whether Marbury had a legal right to his commission, and, if so, whether a *mandamus* to the head of one of the executive departments was a proper remedy for the enforcement of the right.

The objection is not without weight, and deserves careful consideration. Where the precise case before a court is beyond its jurisdiction under any and all circumstances, it is undoubtedly true that when the court holds it is without jurisdiction it thereby bars itself from discussing or deciding what would be the rights of the parties if it had jurisdiction to hear and adjudge the cause.

Those who maintain that no part of Marshall's opinion is *obiter*, insist that certain special facts must not be overlooked. One is that the case relating, as it did, to a Federal commission and a Federal office was within the lawful and general cognizance of the Supreme Court as a case arising under the Constitution and laws of the United States. Another and more important consideration is that it is a settled and unquestioned doctrine founded upon the most solid reasons that no court is justified in exercising the high power of holding an act of the legislative department to be void, unless the necessity is absolutely imperative; that is to say, unless there is no other ground on which a decision of the cause can be placed.

In *Marbury's Case* two opposing principles came into direct conflict. The one side insists that the court could rightfully decide only the question of jurisdiction, although such decision could not be reached except by holding, and that too for the *first time* under the Federal Constitution, that an act of Congress contravened the Constitution and was therefore utterly void. The other side insists that the court was not justified in holding an act of Congress to be unconstitutional if any other ground of decision existed, and that it was the bounden duty of the court to see, as it did, whether any other such ground did exist. Marshall's views of judicial duty on this point were always very pronounced. In after years he thus expressed them: "No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of legislative acts." And this was the test (and it is the true test, everywhere admitted to be such) which he propounded, namely: "If they" (questions of the constitutionality of legislative acts) "become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other grounds, a just respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed."

Jefferson's emphatic contention was that *Marbury's* commission was like a deed or other legal instrument, and could have no validity or effect until *delivery*, and hence

Marbury had no legal right to his undelivered commission. This was certainly a plausible, and who could say that it was not also a well founded, objection until it was examined and decided. If, therefore, Marshall had in his opinion silently ignored the point, and proceeded at once to decide the question whether the act of Congress undertaking to give the Supreme Court original power to issue a *mandamus* was unconstitutional, and had so decided, and had decided nothing else, the criticism would instantly have been made with great force: "Marbury's ground of complaint was plainly destitute of foundation; he had no legal right; if the court had examined this question it would have been compelled so to decide; but instead of doing so, it ignored any consideration of the fundamental basis of the plaintiff's claim and committed the serious fault of unnecessarily deciding an act of Congress to be unconstitutional."

The court was justified, therefore, in the course it pursued; viz., first, to determine whether Marbury had a legal right to his commission; if so, second, whether *mandamus* to the defendant was a rightful remedy. If either of these questions was determined adversely to Marbury that would end the case, and there would be no occasion to consider the far graver and more difficult question whether the act of Congress was unconstitutional, and, if so, to determine the momentous and undecided question, whether the court had the power

to declare it to be void. But since the court reached the conclusion that Marbury's legal right was perfect without a delivery of his commission, and that *mandamus* was the proper remedy to compel a delivery (a conclusion, by the way, adjudged by the Supreme Court eighty years afterwards in Schurz's Case to be correct), it was necessarily obliged to proceed to consider and decide whether the act of Congress which was in conflict with the Constitution was void, and, if so, whether it was the duty of the court so to declare and to refuse to give effect to it.

No hard-and-fast rule can, I think, be laid down for judges as to the grounds on which the decision of a cause should be placed. Marshall had occasion to discuss this subject in his charge to the jury in Burr's Case. The decision of the Supreme Court in the prior case of Bollman and Swartwout in respect to treason was earnestly claimed by counsel to be "contrary to law and not obligatory because it was extrajudicial and was delivered on a point not argued." Referring to this contention, Marshall says: "It is true that in that case, after forming the opinion that no treason could be committed because no treasonable assemblage had taken place, the Court might have dispensed with proceeding further in the doctrines of treason. But it is to be remembered that the judges might act separately, and perhaps at the same time, on

the various prosecutions which might be instituted, and that no appeal lay from their decisions. Opposite judgments on the point would have presented a state of things infinitely to be deplored by all. It was not surprising, then, that they should have made some attempt to settle principles which would probably occur and which were in some degree connected with the point before them."<sup>1</sup>

Jefferson earnestly denied the soundness of every proposition involved in the decision of Marbury's Case. He denied (1) that Marbury had any legal right to his undelivered commission; but, if so, he denied (2) that the court had any power to issue a *mandamus* to a co-ordinate department of the Government; and he afterwards denied (3) that the court could interpose what he terms a "judicial veto" upon an act of another co-ordinate department, namely the legislative department. Marshall was therefore not only warranted on sound legal principles to deal with the case precisely as he did in his opinion, but the extraordinary and novel circumstances made it entirely proper, if not necessary, to deal with it in this manner. In any just sense, no part of the opinion is *obiter*, a word denoting something not easy to define with absolute precision and often difficult to apply.

I forbear further observations, except to say that in these volumes will be found a more extended vindica-

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<sup>1</sup> Burr's Trial (Robertson), II, 403.

tion of Marshall's course by an eminent judge<sup>1</sup> and an eminent lawyer,<sup>2</sup> in whose views and conclusions I fully concur.

## VIII.

The late Mr. Justice Stephen commences his *Story of Nuncomar and the Impeachment of Sir Elijah Impey* on the accusations of Warren Hastings, in these words: "In writing the 'History of the Criminal Law of England,' I was much struck with the way in which nearly all of the most important parts of our history connect themselves one way or another with the administration of criminal justice, and with the importance which, in writing history, attaches to a technical knowledge of the law." This observation, if not so fully true of American as of English history, is emphatically true of the cases of Aaron Burr indicted for treason and also for setting on foot an unlawful military expedition against the then Spanish province of Mexico. None of Marshall's rulings on these celebrated trials is questioned except the one awarding writs of subpoena *duces tecum* addressed to President Jefferson commanding him to appear at the court in Richmond and produce certain designated letters of General Wilkinson to the President, which Burr stated on oath

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<sup>1</sup> Francis M. Finch, sometime Judge of the Court of Appeals of the State of New York, Address, Vol. I, 894 *et seq.*

<sup>2</sup> U. M. Rose, late President of the American Bar Association, Address, Vol. III, 115 *et seq.*



might be material to his defense. The details which I have gathered from Robertson's short-hand report of the trial, Jefferson's letters to District Attorney Hay and Randall's Life of Jefferson, so far as material, are given in the margin.<sup>1</sup>

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<sup>1</sup> Before indictment found, Burr made an affidavit, June 10, 1807, in pursuance of notice given the day before, that he had great reason to believe that General Wilkinson's letter to President Jefferson, dated October 21, 1806, mentioned in the President's message of January 22, 1807, with the accompanying documents and the President's answer, "may be material in his defense," and asked a subpoena *duces tecum* directed to the President commanding him or the Secretaries having them in charge to appear in court bringing the letter of General Wilkinson and the documents and the President's answer to the letter. (Burr's Trial, I, 119.) Whether such a subpoena could be awarded in any case, or on the showing made it ought to be awarded, was discussed at the bar for three days with no little warmth and asperity by Burr himself and by Wickham, Martin, Edmund Randolph and Botta, his counsel, in support of the motion, and by Hay, MacRae and Wirt in opposition to it. The arguments ended June 12.

On June 9, as soon as the subpoena was applied for, District Attorney Hay, in open court, promised if possible to obtain the papers, saying he had no doubt he should succeed. Counsel being unable to make any arrangement as to the production of the papers, the Chief Justice, June 13, delivered an elaborate opinion (Burr's Trial, I, 177-189) holding that the court had the power to issue a subpoena *duces tecum* directed to the President, and that the showing made therefor was sufficient. An express having been immediately sent by Burr with the subpoena to the President, the messenger returned with "a verbal reply from the President that the papers wanted would not be sent by him," i.e. by the messenger. (Burr's Trial, I, 211-249.) In fact, the President, on application of the district attorney, had already voluntarily sent the papers as far as he had them in his possession to that officer accompanied with a letter dated June 12, which began: "Your letter of the 9th is this moment received. Reserving the necessary right of the President of the United States to decide independently of all other authority what papers coming to him as President the

The legality or propriety of Marshall's orders granting subpoenas to the Executive head of the Government to appear in court as a witness or to appear and produce

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public interest permits to be communicated, and to whom, I assure you of my readiness, under that restriction, voluntarily to furnish, on all occasions, whatever the purposes of justice may require." (Burr's Trial, I, 210.)

The President, June 17, wrote a similar letter supplemental to the foregoing, stating that he had ordered the Secretary of War to furnish copies of the orders desired by the defendant, and offering to give his deposition in Washington "if the defendant supposes that there are any facts within the knowledge of the heads of the departments, or of myself, which can be useful for his defense." (Id., I, 254.) But the President expressly denied any obligation or duty to attend in person at Richmond, stating the reasons and ground of this view in the following language: "As to our personal attendance at Richmond, I am persuaded the court is sensible that paramount duties to the nation at large control the obligation of compliance with its summons in this case, as it would should we receive a similar one to attend the trials of Blennerhassett and others in the Mississippi Territory, those instituted in St. Louis and other places on the Western waters, or at any place other than the seat of government. To comply with such calls would leave the nation without an Executive branch, whose agency nevertheless is understood to be so constantly necessary that it is the sole branch which the Constitution requires to be always in function. It could not then intend that it should be withdrawn from its station by any co-ordinate authority." (Burr's Trial, I, 255; Randall's Life of Jefferson, III, 210.) The President also insisted that "from the nature of the case the Executive must be the *sole judge* of what proceedings and papers the public interest will permit to be published. . . . Consider yourself the organ for communicating these sentiments to the court." (Id. 211.)

On June 19, the President for the first time saw Marshall's opinion of the 18th, and in an unofficial letter to the District Attorney June 20, criticising the opinion, he repeats the foregoing views, and inquires: "But would the Executive be independent of the judiciary if he were subject to the *commands* of the latter; if the several courts could bandy him from pillar to post, keep him constantly

letters or documents has been the subject of controversy among lawyers from that time to the present, and different opinions thereon are expressed in the addresses here published.

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trudging from north to south and east to west, and withdraw him entirely from his constitutional duties?" The President, anticipating that an attempt might possibly be made to arrest him for contempt of court for not responding in person to the subpoena, added: "The intention of the Constitution that each branch should be independent of the others is further manifested by the means it has furnished to each to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means than to the Executive." (Randall's Life of Jefferson, III, 212.)

Thus rested the matter until the trial of Burr for treason August 17 to September 1, 1807, when the case of the Government failed because of its inability to make proof of the overt act of treason at Blennerhassett's Island as laid in the indictment, and, therefore, there was no necessity for the Wilkinson letter.

On the subsequent trial of Burr for misdemeanor in setting on foot a military expedition against the Mexican possessions of Spain, Burr, on September 4, 1807, renewed his application for the production of the above-mentioned letter of October 21, 1806, and also another letter from Wilkinson to the President of November 12 of the same year, for which a subpoena *duces tecum* had been awarded, saying in open court that "the President was in contempt, and he had a right to demand process of contempt against him." (Burr's Trial, II, 504.) The District Attorney made no objection to producing the letter of October 21, or the letter of November 12, except two passages therein, which he said were wholly irrelevant and improper to be disclosed, the President having expressly authorized him to keep back such parts of the letter as the District Attorney might think it would be improper to be made public. These parts had not, however, so far as the court was informed, been selected or designated by the President, nor had he declared it to be incompatible with the public welfare to disclose them. When Mr. Hay refused in open court to produce for public inspection the whole letter of November 12, Burr denying the right of the President to delegate his

The learned Professor Thayer (whose recent death we have to deplore), speaking of the issue of a subpoena to President Jefferson, remarks:

"It was a strange conception of the relations of the different departments of the Government to each other, to imagine that a subpoena, that is to say an order accompanied with a threat of punishment, was a legitimate judicial mode of communicating with the Chief Executive.

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authority to another asked that a subpoena *duces tecum* directed to Mr. Hay be awarded immediately. This being done Mr. Hay at once made this return (Burr's Trial, II, 511, 513):

"I hereby acknowledge service of the above subpoena, and herewith return a correct and true copy of the letter mentioned in the same, dated 19th November, 1806, excepting such parts thereof as are, in my opinion, not material for the purposes of justice, for the defense of the accused or pertinent to the issue now about to be joined; the parts excepted being confidentially communicated to the President, and he having devolved on me the exercise of that discretion which constitutionally belongs to himself. The accuracy of this I am willing to refer to the judgment of the court, by submitting the original letter to its inspection. I further certify, in order to show more clearly the irrelevancy of the parts excepted to any defense which can be set up in the present case, that those parts contain a communication of the opinion of the writer concerning certain persons, about which opinion, or the fact of his having communicated it, the writer, if a witness before the court, could not legally, as I conceive, be interrogated; and about which no evidence could legally be received from other persons.

"GEORGE HAY."

The sufficiency of this return being objected to, the questions thereon arising were fully debated, and thereon Marshall rendered his second opinion (Burr's Trial, II, 533) that the defendant was entitled to have the original letter produced, and ordered, on the defendant's motion, that unless produced the cause would be continued. (Id. 537.) See *infra*, pp. xlvii, xlviii, as to Jefferson's letters to Hay of September 7.

On Jefferson's part, this order was received with the utmost discontent, and justly. He had a serious apprehension of a purpose to arrest him by force, and was prepared to protect himself. Meantime he sent to the United States Attorney at Richmond the papers called for, but explained with dignity that, while the Executive was willing to testify in Washington, it could not allow itself to be withdrawn from its station by any co-ordinate authority."<sup>1</sup>

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<sup>1</sup> Thayer, *Life of John Marshall*, 79, 80. Same view, see *post*, I, p. 233. See Ford's *Jefferson*, IX, 63; draft of a letter to District Attorney Hay, given *post*, p. xlix, note. Magruder thus concludes his review of the trial of Burr (*Life of Marshall*, 230): "Thus ended a State trial, the most famous which took place in the United States prior to the impeachment of President Johnson. It could have had no other conclusion in accordance with law. Whether Burr was morally guilty was a question which has been since so much discussed that it cannot be regarded as having been settled by the verdict, but that he was not legally proved to be guilty is certain. The duty of holding the scales of justice even at this trial was the most difficult that Marshall had to encounter during his incumbency on the bench. Jefferson succeeded in importing so much personal feeling and partisanship into the proceedings that the trial wore a very peculiar aspect. There was more in it than party hostility; there was open antagonism between the President of the United States and the Chief Justice; there were also covert and indirect but powerful influences at work in aid of the prosecution. No action of Marshall could have escaped contemporary criticism, and in this case he did not escape it. He was very severely attacked by many persons who honestly thought that he had done wrong. But the fairer judgment of posterity has given him credit for perfect impartiality and for sound, even-handed and courageous administration of the law. The issuing of the subpoena to Jefferson alone remains a controverted point; yet as to this it must be admitted that no authority can be higher or more satisfactory than that of the Chief Justice himself."

My own studies and reflections upon the subject have led me to the following conclusions:

1. No "such divinity doth hedge" the President that by virtue of his office he is, in criminal cases, totally exempt from judicial process requiring his attendance as a witness. In the absence of controlling legislation, a court in such cases has the power, agreeably to the rules and usages of law, to issue to him a subpoena generally to appear as a witness, or a subpoena *duces tecum* to produce a material and relevant document in his possession.

Such was the express decision of Chief Justice Marshall in Burr's case; and accordingly he awarded, on Burr's application, a subpoena *duces tecum* directed to President Jefferson, then in Washington, requiring him to appear and produce at the trial in Richmond certain designated letters and documents in his possession or under his control, which the defendant stated under oath might be material to his defense.

The substantial ground of the criticism of Marshall's action in subpoenaing the President is the imputed absolute independence, personal and official, of the Executive of any control by a co-ordinate department, and the inability of the court to enforce against the President obedience to the writ by proceedings for contempt,—the argument being that the want of ability to enforce the writ demonstrates the want of power to issue it. These were Jefferson's views. He stated them distinctly in his

letters to District Attorney Hay, and he directed that officer to communicate them to the court. In an unofficial letter to the same officer he clearly intimated that he would resist by force, as an invasion of the Executive province, any attempt on the part of the Judiciary to compel his personal attendance at Richmond, and thereby withdraw him from the exercise of his functions.

The decision of the Chief Justice as to the power of the court, and, on a proper showing by the defendant, the duty of the court to issue the writ, seems to me to be correct. It is a singular fact which Marshall's critics appear to have overlooked that each of the three able lawyers who represented the United States on the Burr trials, including Mr. Wirt, who was specially retained for the Government by the President, distinctly and repeatedly admitted the power; the controversy at the bar being waged, not against the general power of the court to subpoena the President, but against the sufficiency of the showing made by the defendant for the exercise of the power, since Burr's affidavit for the writ only stated that the letter and documents "*may* be material to his defense."<sup>1</sup> Accordingly, the Chief Justice in giving his

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<sup>1</sup> The following is taken from Robertson's report of the trial of Burr:

MR. WIRT: "The counsel for the prosecution do not deny that a general subpoena *ad testificandum* may be issued to summon the President of the United States and that he is as amenable to that process as any other citizen. If his public functions disable him

opinion on the point now under discussion said: "That the President of the United States may be subpoenaed and examined as a witness, and required to produce any

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from obeying the process, that would be a satisfactory excuse for his non-attendance *pro hac vice*; but does not go to prove his total exemption from the process. . . . But here is a motion for a subpoena *duces tecum* to compel the President to produce certain papers of state, the materiality of which is not shown.

"I shall contend first, sir, that the subpoena *duces tecum* is not a process of right; that the motion for it is a motion addressed to the discretion of the court; and that the court may award or withhold it as it sees fit. In the next place, I shall contend that this discretion of the court should be controlled and determined only by relevancy and materiality of the papers required. And thirdly, as far as appears, the papers required are both irrelevant and immaterial.

"I shall proceed to show, in the first place, that the subpoena *duces tecum* is not a process of right, but that the application for it is addressed merely to the discretion of the court."

MR. WICKHAM (Counsel for Burr): "That is admitted." Burr's Trial (Robertson), I, 186, 187. A like admission was expressly made by Mr. MacRae, counsel for the United States, Id. 131. And also by District Attorney Hay, Id. 149. See also Id. 127 (Luther Martin), 154 (Edmund Randolph).

The debate was not upon the question whether a general subpoena to the President could issue (that was conceded), but upon the right of the defendant upon the showing made to the particular subpoena *duces tecum* which he sought and the duty of the court under the circumstances to issue it to the President. Accordingly Marshall, in giving his opinion (Burr's Trial, I, 178-180), after referring to the provision of the eighth amendment of the Constitution giving to the accused "in all criminal prosecutions the right to compulsory process for obtaining witnesses in his favor," and to a similar provision in an act of Congress, said: "There is no exception whatever" in the Constitution or statute. . . . "If, then, as is admitted by the counsel for the United States, a subpoena may issue to the President, the accused is entitled to it of course; and whatever difference may exist with respect to the power to compel the same obedience to the process as if it had been directed to a private citi-



paper in his possession, *is not controverted*. The President, although subject to the general rules which apply to others, may have sufficient motives for declining to pro-

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zen, there exists no difference with respect to the right to obtain it. The guard furnished to this high officer to protect him from being harassed by vexatious and unnecessary subpoenas is to be looked for in the conduct of the court after those subpoenas have issued; not in any circumstance which is to precede their being issued. If, in being summoned to give his personal attendance to testify, the law does not discriminate between the President and a private citizen, what foundation is there for the opinion that this difference is created by the circumstance that his testimony depends on a paper in his possession, not on facts which have come to his knowledge otherwise than by writing? The court can perceive no foundation for such an opinion. The propriety of introducing any paper into a case as testimony must depend on the character of the paper, not on the character of the person who holds it. A subpoena *duces tecum*, then, may issue to any person to whom an ordinary subpoena may issue, directing him to bring any paper of which the party praying it has a right to avail himself as testimony, if, indeed, that be the necessary process for obtaining the view of such paper." (Burr's Trial (Robertson), I, 182.)

And in the second opinion granting the motion of Burr to continue the trial for misdemeanor unless the District Attorney (in whose possession was the original letter of November 12) would produce that letter entire, the Chief Justice said: "That the President of the United States may be subpoenaed and examined as a witness, and required to produce any paper in his possession, is not controverted." (Id., II, 535.) "In this case, however, the President has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by the President himself, not by another for him," *e. g.*, Mr. Hay. (Id., II, 536.) "Perhaps the court ought to consider the reasons which would induce the President to refuse to exhibit such a letter as conclusive on it, unless such letter could be shown to be absolutely necessary in the defense." "In no case of this kind would a court be required to proceed against the President as against an ordinary individual. . . . Had the President when he transmitted it (to Mr. Hay) stated that

duce a particular paper, and those motives may be such as to restrain the court from enforcing its production."<sup>1</sup>

"The guard furnished to this high officer to protect him from being harassed by vexatious and unnecessary sub-

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in his judgment the public interest required certain parts of it to be kept secret and had accordingly made a reservation of them, all proper respect would have been paid to it; but the President has made no such reservation. . . . The only ground laid for the court to act upon is the affidavit of the accused; and from that the court is induced to order that the paper (original letter of November 19 in Mr. Hay's possession) be produced, or the cause be continued." (Id., II, 536, 537.)

Mr. Hay, on this ruling being made, said "he would produce the letter under the restrictions of the court (that there should be no publicity or use made of the parts of it which Mr. Hay desired to reserve, 'but what was necessarily attached to the case'); preferring that to a continuance of the cause." (Id. 537.)

Mr. Jefferson took higher grounds than the counsel of the Government and denied the power of the court under any circumstances to issue a subpoena of any kind to compel his personal attendance at the trial, since to comply with its commands "would leave the Nation without an Executive branch, the sole branch which the Constitution requires to be always in function; and the Constitution could not therefore intend that the Executive should be withdrawn from its station by any co-ordinate authority." (Letter to Hay, June 17, 1807; Text, Burr's Trial, I, 254, 255; Jefferson's Works (published by Congress), V, 96; Same point, letter to Hay, June 20, 1807, Id. 103.)

The President also insisted that he had the sole right to determine independently of any other authority what papers coming to him as President ought not to be made public, and that his determination was conclusive upon the courts even in the case of judicial trial for a capital offense. On this point he said, "he (the President), of course, from the nature of the case, must be the *sole judge* of which of them the public interest will permit publication." (Burr's Trial, I, 210 (letter to Hay, June 12, 1807); Id. 255 (letter to Hay, June 17, 1807); Works of Jefferson (published by Congress), Vol. V, 94, 96.)

<sup>1</sup> Burr's Trial (Robertson), II, 535.

poenas is to be looked for in the conduct of the court after those subpoenas have issued; not in any circumstance which is to precede their being issued. . . . The court can perceive no objection to a subpoena *duces tecum* to any person whatever, provided the case be such as to justify the process."<sup>1</sup>

That is to say, the right of the defendant to the process of the court, and the power of the court to award it, is one thing; what the court will do or can do if the requirements of the writ be not complied with is quite another thing, and one to be dealt with when return to the writ shall be made. I may further observe that the law has provided no method of voluntary communication by the court with the Executive. It cannot open a correspondence or negotiate terms. It does not write letters. It issues writs, makes orders and renders judgments; and, in the absence of legislation, it can act in no other way. It is no answer, as it seems to me, to the power to issue the writ that if it is disobeyed the court has no power to enforce obedience. It has the right to presume that its writ will be obeyed, or if not obeyed that the reasons therefor will be shown in due course to the court.

Inasmuch as in *Marbury against Madison* it was decided that ours is a government of laws and not of men, and that every department thereof is subject to the supremacy of the Constitution, and inasmuch as the Con-

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<sup>1</sup> *Burr's Trial*, I, 182.

stitution expressly gives to the accused "in all criminal prosecutions the right to compulsory process for obtaining witnesses in his favor," no exception of the President being made either in the Constitution or the act of Congress in that behalf, Marshall's conclusion that the court has the power, and on proper showing that it is its duty, to issue such a writ seems to be sound.

2. Respecting the power and duty of the court upon the return of the writ, no certain rules, in the absence of legislation, can be laid down.

In the two opinions on this subject given by the Chief Justice on the Burr trials he reserved all such questions until the return of the process. He said: "In no case of this kind would the court be required to proceed against the President as against an ordinary individual." "I cannot precisely lay down any general rule for such a case." And he added: "Perhaps the court ought to consider the reasons which would induce the President to refuse to exhibit such a letter as conclusive on it, unless such letter could be shown to be absolutely necessary in the defense. . . . Had the President, when he transmitted the letter [of November 12, 1806, to the District Attorney, Hay], subjected it to certain restrictions, and stated that in his judgment the public interest required certain parts of it to be kept secret, and had accordingly made a reservation of them, all

ance, consented to produce the letter, but, as above stated, it was not offered or used on the trial.<sup>1</sup>

Some curious, and what came perilously near proving momentous, facts, and which are necessary to a full understanding of the situation, appear by comparing what is shown in Robertson's report of the trial of Burr with the two letters of September 7, 1807, below mentioned, written by the President from his home at Monticello to Mr. Hay at Richmond, where Burr's second trial was in progress. On September 4, Mr. Hay stated in open court that he had in his possession the original letter of General Wilkinson to the President of November 12, but he declined to produce and submit to public inspection the *whole* letter. Thereupon the court awarded a subpoena *duces tecum* directed to Mr. Hay, returnable immediately, requiring *him* to produce the letter which he admitted to be in his possession. Mr. Hay at once acknowledged service of the writ, and immediately furnished, September 4, a true *copy* of the letter of November 12, "excepting such parts thereof as are, in my opinion, not material for the purposes of justice for the defense, or pertinent to the issue about to be joined; the parts excepted being confidentially communicated to the President, and he hav-

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<sup>1</sup> Magruder says that the letters "were used by the prisoner on his trial." (Life of Marshall, 225.) But I find no evidence of this in Robertson's report of the trials of Burr.

ing devolved on me the exercise of that discretion which constitutionally belongs to himself."<sup>1</sup> It was on the sufficiency of this return that Marshall's second opinion was given; it was apparently rendered on September 4, but at all events it was before the next meeting of the court, on September 9.<sup>2</sup> It was in this opinion that the Chief Justice decided that the President could not delegate his discretion to Mr. Hay; that it was the duty of Mr. Hay to produce for inspection the entire *original* letter admitted to be in his possession, and that unless he did so the defendant's motion to continue the cause would be granted. Robertson's short-hand report shows nothing further in respect to the letter except that Mr. Hay stated to the court that he preferred to produce it rather than submit to a continuance.<sup>3</sup>

Mr. Jefferson's published correspondence contains the two letters above mentioned to Mr. Hay, both dated September 7, and written from Monticello. From these letters it appears that Mr. Hay had enclosed to the President on September 5 a subpoena *duces tecum*, and also the *original* letter of General Wilkinson of November 12. In one of the letters of September 7, the President said to Mr. Hay: "I received late last night your favor of the day before, and now re-enclose you the subpoena. As I do not

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<sup>1</sup> Burr's Trial (Robertson), II, 505, 518; *ante*, p. xxxv, note.

<sup>2</sup> Burr's Trial, II, 504, 533, 537.

<sup>3</sup> *Id.*, II, 587.

proper respect would have been paid to it; but he has made no such reservation. This must be decided by himself, not by another for him."<sup>1</sup>

Jefferson distinctly authorized the court to be informed that his view was that the President's judgment as to what the public interest required was conclusive, and not subject to judicial revision. The foregoing extracts from Marshall's opinion tend to show that the court would not necessarily accept the President's judgment as conclusive if the paper withheld was "absolutely necessary in the defense." But no decision of the point as to the *conclusiveness* of the President's judgment was required. Upon the application of the District Attorney, and before Marshall's decision awarding the first subpoena was made, the President *voluntarily* caused the letter and documents to be sent to the District Attorney, and they were in the possession of that officer in Richmond, the place of the trial. The course of the President as shown in the somewhat voluminous correspondence with Mr. Hay is open to no fair criticism, and was dictated by his sense of official duty under the Constitution "to protect the Executive from judiciary usurpation," and not by any purpose or desire to deprive Burr of any proper testimony. Nor, after careful examination, can I perceive any ground whatever for a statement or suggestion that Marshall's course was influenced in the slightest de-

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<sup>1</sup>Burr's Trial, II, 536, 537.

gree, consciously or unconsciously, by his personal relations with the President, by any desire to offend or annoy him, or, indeed, by any consideration whatever except his deliberate conviction that Burr, on the case presented to the court, had the legal right to the writ, and consequently it was the duty of the court to protect and secure that right,—an unsought, an unavoidable duty, but one which the court performed with dignity and courage.

The trials for treason and for misdemeanor broke down by reason of the failure of the Government's evidence to show that the defendant committed the offenses laid in the indictments at any place within the jurisdiction of the court, and the letters of General Wilkinson were not offered or used on the trials; and no further rulings were made by the court on the subject of the letters or of the respective powers of the President and the court.

The President's personal attendance had been waived provided the required documents were produced, and the necessity of making any decision as to the conclusiveness of his power to withhold papers was avoided by the motion of the defendant that, unless the *whole* letter of November 12 in Mr. Hay's possession was produced and deposited with the clerk for the defendant's inspection, the cause be continued. Marshall, after full argument, decided that he would sustain the motion, whereupon Mr. Hay, rather than submit to a continu-



may at any time occur; but quite aside from such a contingency, the principles which necessarily underlie the determination of the inquiry whether or how far the President is amenable to the power of the court belong to the *arcana* of the Constitution, are deeply interesting in their nature, and involve questions similar to those which were discussed or determined in the great case of *Marbury against Madison*,—questions whose roots strike deep down into the foundations of the national structure.<sup>1</sup>

Whether a distinct and positive return by the President to the writ that his public duties require him to remain at the seat of government, or at his residence for

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to divide his court and procure a truce at least in so critical a juncture."

<sup>1</sup> In support of the view that the President is or may be exempt from the process of subpoena by reason of the constitutional nature of his duties, reference may be made to the opinion of Attorney-General Henry Stanbery, in the *Opinions of the Attorneys-General*, vol. 12, p. 85, and also to his argument in the case of the *State of Mississippi v. Johnson*, 4 Wallace, 475 (1866), at page 483 *et seq.* Mr. Stanbery is mistaken in his statement that the counsel for the United States did not admit that such process could be issued against the President. He is also mistaken in saying that Col. Burr himself moved for compulsory process to compel the President to come. He is also mistaken in stating that the court hesitated to follow up the subpoena by process of attachment, and that not a step further was taken towards enforcing the doctrines laid down by the Chief Justice. Nevertheless the argument that the President under the Constitution and laws of the United States has a peculiar immunity from the jurisdiction and process of the courts is stated by this able lawyer with great force; but it has failed to convince the Editor that his conclusions as given in the text are erroneous. See *In re Neagle*, 135 U. S. 1 (1890), relating to the assault upon Mr. Justice Field, and *The State v. Delesdenier*, 7 Texas, 95.

the time being, or a return that he refuses to produce a given document because the public interest forbids its publication,—whether such a return is conclusive upon the court was, as I have said, not decided by the Chief Justice on the Burr trials; but if I may venture an opinion on the point it is that such action on the part of the President solemnly taken is not subject to judicial revision, and obviously it is not capable of judicial enforcement against the Executive. If the President under the Constitution is the sole judge of what the public interest requires of him, his judgment ought to be received by the court without question or criticism. At all events the utmost the court could properly do would be to express its opinion as to the legal rights of the defendant, cause it to be recorded and officially certified to the President, who would thus be compelled to assume the public responsibility for his action. Any other course would involve two co-ordinate branches of the government, each in its sphere equal and independent, in an unseemly conflict, and a fruitless conflict so far as the court is concerned, because of its inability to give effect to its decision against the Executive.<sup>1</sup>

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<sup>1</sup> Chief Justice Taney in 1861 dealt with a somewhat similar situation in Merryman's case. Here Gen. Cadwalader, commanding at Fort McHenry, where the petitioner, Merryman, was held under military arrest, having refused to obey the writ of *habeas corpus* issued by the Chief Justice, May 26, 1861, an attachment for contempt was issued against the commandant at the Fort, which the marshal

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The institution of the day commemorated was undoubtedly inspired by Marshall's judicial services, and mainly by his vast labors for more than a third of a century in expounding the Constitution, and his splendid triumph in establishing it in the regard and confidence not only of our own people, but of the world. But it is not desirable if it were possible, and it is not possible if it were desired, wholly to separate the magistrate from the man. Curiosity respecting the traits of character

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was unable to serve. The Chief Justice said that the marshal had the power to summon the *posse comitatus*; but where, as in this case, the power refusing obedience was so notoriously superior to any the marshal could command, he held that officer excused from doing anything more than he had done. "I have exercised all the power which the Constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. . . . I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the court and direct the clerk to transmit a copy under seal to the President of the United States. It will then remain for that high officer, in fulfillment of his constitutional obligation to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced." This course was pursued, but the rebellion was then flagrant, and President Lincoln did nothing. Tyler, *Memoirs of Taney*, 420-426, 640-659; *Same Case*, *Ex parte Merryman*, *Taney's Circuit Court Decisions*, 246 (1861). Lord Campbell, in his *life of Lord Keeper Coventry* (*Lives Lord Chancellors*, Chapter LXII), says that whether the sovereign may be examined as a witness since there is no temporal sanction to the oath, or may be compelled to testify in any civil or criminal case either on oath or without being sworn, is "a curious constitutional question which remains to this day undetermined." In a note to this paragraph the author refers to several cases in which the question arose.

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and manner of life of those who have filled a large space in the public eye is universal and rational. This naturally found recognition in the celebrations of the day, and many of the orators dealt with Marshall on his personal as well as public side. The addresses reveal the pleasing fact that he was one of "those whose hearts have a slope to the southward, and are open to the whole noon of nature." From their reading we rise loving the man as much as we admire the judge. On his death the Bar of Virginia, who knew him so well as neighbor and friend, resolved "that highly as he was respected, he had the happiness to be yet more beloved." Story, who was Marshall's intimate associate for a quarter of a century, has left on record delightful pictures of the genuine simplicity of his nature; his modesty of demeanor, though fully conscious of his own great powers; his sense of moral obligation and love of truth; his deep tenderness; his respect for woman, her abilities, virtues and excellences; and his reverence for and exemplification of all of the domestic virtues. In the anguish of his sorrow over the recent death of his beloved chief, Story declared that Marshall's private character and virtues gave him the highest of all of his titles to affectionate regard and admiration. His noble tribute is in these words:

"After all, whatever may be Marshall's fame in the eyes of the world, that which, in a just sense, was his highest glory was the purity, affectionateness, liberality

and devotedness of his domestic life. Home, home, was the scene of his real triumphs."

All that has since been learned has only confirmed contemporary appreciation; and the Editor of these volumes has been anxious that no fact or circumstance should be omitted from the addresses which would illustrate Marshall's private as well as public character. This is the more necessary, as unfortunately we have comparatively so few letters, documents or data from Marshall's own hand concerning himself; remarkably few. His kinsman and life-long opponent, Jefferson,<sup>1</sup> went through his long and active life pen in hand, always thinking and doing, and always putting on paper whatever he thought or did, great or small. There are extant thousands of his letters, and memoranda unnumbered.

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<sup>1</sup> The relationship between Jefferson and Marshall is thus stated by the Hon. William A. Maury, formerly Assistant Attorney-General of the United States, and now of the Spanish Treaty Claims Commission, in one of his interesting articles on Marshall, published in the *Columbian University Magazine*, Washington, D. C., vol. I, pp. 47, 48, December, 1901, as follows:

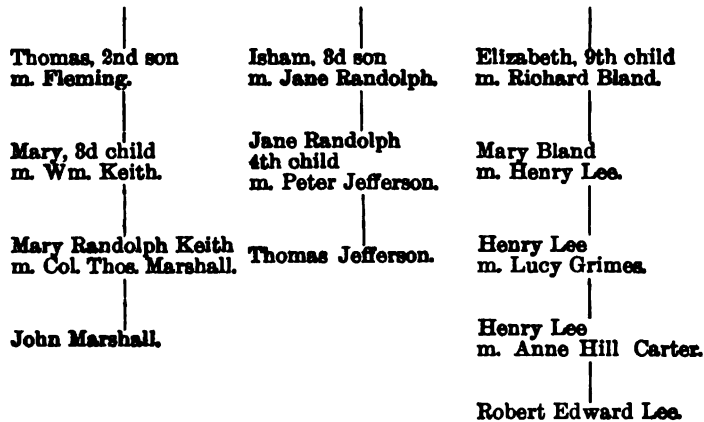
"John Marshall, who solidified the Union, and Thomas Jefferson, who headed the reactionary movement against the Constitution which set in so soon after its adoption, and finally culminated in the civil war, and Robert E. Lee, who drew his sword to force to their logical result the teachings of Jefferson's pen, were all three descended from Col. William Randolph of Turkey Island, the first of the name who emigrated to Virginia, where he became the progenitor 'of a widespread and numerous race, embracing the most wealthy families and many of the most distinguished names in Virginia history.' Marshall's mother, Mary Keith, Jefferson's mother, Jane Randolph, and Lee's grandmother, Mary Bland, were all three granddaughters

Not so in Marshall's case. Yet happily we have enough to delineate the essential traits of his character and the incidents of his simple, blameless and noble life. Excellent biographies of Marshall, on a limited scale, written by Magruder and Thayer, for laymen rather than lawyers, and valuable articles on Marshall's decisions and their influence by Hitchcock, Carson, Van Santvoord, Flanders and others, written for lawyers rather than laymen, have appeared; but a life comprehensive in its scope, which shall make Marshall's judicial career with its surroundings and accessories its central feature, give a critical estimate of his great decisions, and trace their effect upon the national history — such a Life yet awaits some genius

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of this William Randolph." The following diagram furnished by Mr. Maury clearly illustrates the relationship: —

Col. Wm. Randolph, of Yorkshire, England, and "Turkey Island," Virginia, married Mary, daughter of Henry and Catherine Isham of Bermuda Hundred, Virginia.



for biography with adequate legal training, having something of Boswell but more of Plutarch, who can worthily achieve a work so weighty, difficult and delicate.<sup>1</sup>

Prior to the biographies mentioned, the late Edward J. Phelps, in his masterly address on Marshall before the American Bar Association, in 1879, said: "Lives enough have been thought worth writing that never were worth living; but the life of this great magistrate

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<sup>1</sup> An interesting reminiscence relating to Chief Justice Marshall at the January term, 1835, the last at which he was present, to the place where the court was then held, and to the custom of the judges on entering the court room to stop and robe themselves in the presence of the bar before ascending the bench, is given by the distinguished and venerable William Allen Butler, his father being at that time the Attorney-General of the United States. In a letter to the editor, March 11, 1901, Mr. Butler, after referring to the Albany Marshall Day celebration, says: "I saw Chief Justice Marshall during the last term of the Supreme Court at which he was present. I was a boy ten years of age, but I well remember walking up Pennsylvania Avenue in company with my father and William Wirt early in 1835, and going into the old court room, where the library now is, and looking at the procession of judges, with the Chief Justice at its head, and being particularly struck with their putting on their gowns in the court room before they went on the bench. I have seen every Chief Justice since that time and argued cases before them all, but none of them equaled, in personal interest and judicial supremacy, their illustrious predecessor, whom your address sets in so clear and true a light." The editor in a note to Mr. Butler referred from memory to Virgil's account of how, on the return of an embassy to Diomedes, one of the ambassadors exulted in the thought that he had touched the hand of the great Greek hero, remarking that Mr. Butler's visit put him almost as near to the Great Chief Justice. To this Mr. Butler made the pleasant response: "Your very kind letter of the 23d ultimo came as a very pleasant *postea* to the judgment I had expressed to you. I have looked up the passage in the *Aeneid* to which you refer and find that it bears out accurately your version of the embassy to

is unwritten still. Perhaps it is as well that it should be. Time was needed to set its seal upon the great lessons he taught; experience was requisite to show what was the result of following and what the result of

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Diomedes and the report of one of the ambassadors that he had 'touched the hand by which Troy's kingdom fell.' You ask whether my reference to the old court room of the Supreme Court refers to the present Law Library. This is the fact. The Supreme Court sat in the present law library room until they took possession of the chamber vacated by the Senate. The bench was on the side of the room where the windows are, the bar occupying the space now filled by the book-cases radiating from the centre space in front of the windows. The judges came into court through the door by which the library is now entered and their gowns were taken from a row of hooks or pegs just inside the entrance."

The editor deeply regrets to record the lamented death of Mr. Butler, September 9, 1903, at his residence, Round Oak, Yonkers, New York, while this reference to him was passing through the press.

Another interesting reminiscence of Marshall was communicated to the editor by Mr. Thomas Marshall Smith, a great-grandson of the Chief Justice. Mr. Smith says: "Justice Gray wrote me some time ago that he regretted he did not know at the time he made his address that Chief Justice Marshall had worn the greater part of his life a seal with the motto, 'Veritas vincit,' engraved on it. My mother tells me, 'he found an amethyst on his farm, "Oak Hill," and had it set, with the above motto, which belonged to his family, engraved on it.' A short time since my mother received a letter from a friend in Virginia, in which she writes: 'Chief Justice Marshall's father wrote to a friend in Edinburgh, asking that he would send over a tutor for his many boys. He said he must be a gentleman, a college graduate, especially well versed as a Greek and Latin scholar, and an Episcopalian.' The tutor selected had just been ordained deacon. He came at once, and returned later, to be made Priest by the Bishop of London. She added: 'Did you know the tutor referred to was the Rev. John Thompson, my great-grandfather?' I mention the above because there has been so much said about Marshall's limited education, when in fact he had the very best advantages that could be given at that time."



departing from them. Some day the history of that life — that grand, pure life — will be adequately written. But let no 'prentice hand essay the task! He should possess the grace of Raphael, and the color of Titian, who shall seek to transfer to an enduring canvas that most exquisite picture in all the receding light of the days of the early Republic." Mr. Phelps, if any one, possessed these ideal qualifications; but alas! he died without undertaking the work whose requirements he so well understood and so finely portrayed.

In conclusion, the Editor, in addition to his thanks expressed in the body of the work, gratefully acknowledges his sense of special obligation to the officers of the American Bar Association, to those of the several State Bar Associations, to all of the gentlemen whose addresses are here published, and to MR. THOMAS MARSHALL SMITH, MR. JAMES H. MCKENNEY, MR. GEORGE S. CLAY, MR. HIRAM P. DILLON and MR. JOHN M. DILLON for many kind offices and needed assistance in the preparation and issue of these volumes.

J. F. D.

KNOLLCREST,

*Far Hills, New Jersey,*

December, 1902.

## JOHN MARSHALL MEMORIAL.

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*CENTENNIAL ANNIVERSARY HELD AT WASHINGTON, D. C.*

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"John Marshall Day," February 4, 1901, was appropriately observed by exercises held in the hall of the House of Representatives, and attended by the President, the members of the Cabinet, the Justices of the Supreme and District courts, the Senate and House of Representatives, and the members of the Bar of the District of Columbia, besides a large concourse of invited guests. The programme, prepared by a Congressional committee acting in conjunction with committees of the American Bar Association and the Bar Association of this District, was characterized by a dignity and simplicity befitting the life of the great Chief Justice.

Shortly after ten o'clock Representative John Dalzell, of Pennsylvania, called the assemblage to order. Mr. Dalzell remarked that it was appropriate that an honored successor of John Marshall should preside, and he requested Representatives Grosvenor and Richardson to escort Chief Justice Fuller to the rostrum, to whom he yielded the gavel. Rev. Dr. William Strother Jones, of Trenton, N. J., a great-grandson of Chief Justice Marshall, delivered the invocation.<sup>1</sup>

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<sup>1</sup> This account of the exercises held at the National Capital is taken from *THE WASHINGTON LAW REPORTER*, vol. xxix, p. 86, February 7, 1901.

**Introductory Remarks of Chief Justice Fuller on taking the Chair.**

The August Term of the year of our Lord eighteen hundred of the Supreme Court of the United States had adjourned at Philadelphia on the fifteenth day of August and the ensuing term was fixed by law to commence on the first Monday of February, eighteen hundred and one, the seat of the government in the meantime having been transferred to Washington. For want of a quorum, however, it was not until Wednesday, February fourth, when John Marshall, who had been nominated Chief Justice of the United States on January twentieth by President Adams, and commissioned January thirty-first, took his seat upon the Bench, that the first session of the court in this city began.

It was most fitting that the coming of the tribunal to take its place here as an independent, co-ordinate department of the government of a great people should be accompanied by the rising of this majestic luminary in the firmament of Jurisprudence, to shine henceforth fixed and resplendent forever.

The growth of the Nation during the passing of a hundred years has been celebrated quite as much perhaps in felicitation over results as in critical analysis of underlying causes, but this day is dedicated to the commemoration of the immortal contributions to the possibilities of that progress, rendered by the consummate intellectual ability of a single individual exerted in the conscientious discharge of the duties of merely judicial station.

And while it is essential to the completeness of any picture of Marshall's career that every part of his life should be taken into view, it is to his labors in exposition

of the Constitution that the mind irresistibly reverts in recognition of "the debt immense of endless gratitude" owed to him by his country.

The court in the eleven years after its organization, during which Jay and Rutledge and Ellsworth — giants in those days — presided over its deliberations, had dealt with such of the governmental problems as arose in a manner worthy of its high mission; but it was not until the questions that emerged from the exciting struggle of 1800 brought it into play, that the scope of the judicial power was developed and declared, and its significant effect upon the future of the country recognized.

As the Constitution was a written instrument, complete in itself, and containing an enumeration of the powers granted by the people to their government — a government supreme to the full extent of those powers, — it was inevitable that the issues in that contest (as indeed in so many others) should involve constitutional interpretation, and that finally the judicial department should be called on to exercise its jurisdiction in the enforcement of the requirements of the fundamental law.

The President, who took the oath of office administered by the Chief Justice, March 4, 1801, in his inaugural, included among the essential principles of our government "the support of the State governments in all their rights, as the most competent administrations for our domestic concerns, and the surest bulwarks against anti-republican tendencies;" and "the preservation of the General Government in its whole constitutional vigor, as the sheet-anchor of our peace at home and safety abroad;" but it was reserved for the Chief Justice, as the organ of the court, to define the powers and rights of each, in

the exercise of a jurisdiction which he regarded as "indispensable to the preservation of the Union, and consequently of the independence and liberty of these States."

The people, in establishing their future government, had assigned to the different departments their respective powers, and prescribed certain limits not to be transcended, and that those limits might not be mistaken or disregarded, the fundamental law was written. And as the Chief Justice observed, "to what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained?"

The Constitution declared: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land;" and "the judicial power shall extend to all cases, in law or equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

The judicial power was, then, in a general sense, co-extensive with the legislative power, the executive power, and the treaty-making power, and to the department created for its exercise was exclusively committed the ultimate construction of the Constitution, although that power could not be invoked save in litigated cases and could not act directly beyond the rights of the parties.

And as the rule of construction was merely a question of law, it was to be, and it was, determined and applied according to law.

The principles applicable to the construction of written documents were thoroughly settled, and in themselves exceedingly simple. Applying them to the Constitution, the Chief Justice declared that "the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers;" that while it was not open to dispute that an "enlarged construction which would extend words beyond their natural and obvious import," should not be indulged in, it was not proper, on the other hand, to adopt a narrow construction, "which would deny to the Government those powers which the words of the grant, as usually understood, import, and which were consistent with the general views and objects of the instrument; that narrow construction, which would cripple the Government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent."

These were apparently plain legal rules of construction, yet in their application is to be found the basis of the National fabric; the seed of the National growth; the vindication of a written form of Government; and simple as they now appear to be, their successful application then required the highest judicial qualities.

For we are to remember that there had been intense opposition to the adoption of the Constitution; that each of the Departments necessarily acted on its own judg-

ment as to the extent of its powers; and that the operation of the sovereignty of the Nation on the powers of the States was the subject of heated partisan controversy.

To hold the balance true between these jarring poles; to tread the straight and narrow path marked out by law, regardless of political expediency and party politics on the one hand, and of jealousies of the revising power on the other; to reason out the governing principles in such manner as to leave the mind free to pursue its own course without perplexity, and to commend the conclusions reached to the sober second thought; these demanded that breadth of view, that power of generalization, that clearness of expression, that unerring discretion, that simplicity and strength of character, that indomitable fortitude, which, combined in Marshall, enabled him to disclose the working lines of that great republic whose foundations the men of the Revolution laid in the principles of liberty and self-government, lifting up their hearts in the aspiration that they might never be disturbed, and looking to that future when its lofty towers would rise "into the midst of sailing birds and silent air."

During these first years of constitutional development in the due administration of the law, it was inevitable that bitter antagonisms should be engendered, but their shafts fell harmless before that calm courage of conviction which, perceiving no choice between dereliction of duty and subjection to obloquy, could exclaim with the Roman orator: "*Tamen hoc animo semper fui, ut invidiam virtute partam, gloriam, non invidiam, putarem.*"

And so the great Chief Justice, reconciling "the jealousy of freedom with the independence of the judiciary," for a third of a century pursued his stately way, establish-

ing in the accomplishment of the work given him to do those sure and solid principles of government on which our constitutional system rests.

The Nation has entered into his labors and may well bear witness, as it does to-day, to the immortality of the fame of this "sweet and virtuous soul," whose powers were so admirable, and the results of their exercise of such transcendent consequence.

The address of Chief Justice Fuller was heartily applauded, and at its close he presented ex-Attorney General Wayne MacVeagh, whose oration follows:

*Oration of Wayne MacVeagh.<sup>1</sup>*

To-day is dedicated to the law. I therefore speak to you as a lawyer; and I congratulate you that it is part of our happy fortune that the occasion which brings us together offers in itself its amplest and completest justification. It would indeed have been a grave dereliction of duty if the brotherhood of American lawyers, on the bench and at the bar, had not assembled to honor with fitting observances the centennial anniversary of the entrance by John Marshall into the office of Chief Justice of the United States.

And the place where we are assembled is of all places the most fitting for these ceremonies; for it was here, in the capital of the country he loved so devotedly and served so faithfully, that he was attended by those patient and achieving years during which his labors enrolled his name

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<sup>1</sup> This address was published with the following title: "John Marshall: An address delivered upon the invitation of the American Bar Association and a Joint Committee of Congress, in the hall of the House of Representatives, February 4, 1901, by Wayne MacVeagh."



among the few immortal benefactors of mankind. It is also eminently fitting that such an occasion should be honored by the presence of the Chief Magistrate and the members of the Cabinet, whose subjection to the law was determined by him; by the presence of members of that illustrious tribunal the vast extent of whose rightful jurisdiction was determined by him; by the presence of distinguished Senators and Representatives, representing in Congress the States whose proper and abiding place in our governmental system was determined by him; and by the presence of citizens of the country which under his forming hand, instead of becoming a dissoluble confederacy of discordant States, became a great and indissoluble nation, endowed with all the powers necessary to enable it not only to protect itself against enemies at home or abroad, but also to accept and discharge the splendid and ennobling mission which had been confided to it in the divine purpose for the education of the world, and which he recognized when first of all men he spoke of the Empire of America — that of securing to the whole American continent "government of the people, by the people, and for the people."

The small Virginia hamlet in which John Marshall was born on the twenty-fourth day of September, 1755, is almost within sight from the noble terrace of the Capitol, and, much as the world has changed, that section of Virginia has not very greatly changed since that day. His birth fell almost half way between the opening of the seventeenth century and the opening of the twentieth — midway of the three centuries which, in many important respects, of all the centuries, have been the most fruitful, the most interesting, and the most beneficent.

The first half of that stirring period of

“Change, alarm, surprise,”

witnessed what is probably the most far-reaching and certainly the most romantic drama of history — the colonization of America. The landing at Jamestown had followed the dawn of the seventeenth century by only seven years, and the Pilgrims having landed in Massachusetts in 1620 and William Penn having landed in Pennsylvania in 1683, it is reasonably accurate to consider that the essential and formative labors of the first settlers extended over and were comprised within the hundred and fifty years preceding John Marshall's birth, and that a like period of a hundred and fifty years extends from his birth to the day on which we are assembled to do honor to his memory.

I know not how others may feel, but I have never been able to read a single page of the marvelous story of the settlement of America without an access of generous enthusiasm, and of seeming to be lifted into a purer and serener air. The men engaged in those transforming labors were fully conscious of the greatness of the work given them to do; and they addressed themselves to it as co-workers with God for the advantage, not only of themselves and their children, but of the future generations which were to rise up and call them blessed, as age after age entered upon its inheritance of the free institutions prepared for it, by the unceasing toil and the unwitnessed sacrifice, by the lonely vigil and the drear winter, by the fear of sudden massacre and the absence from all accustomed joys, by the unshed tears and by the shed blood of the first comers to these shores.

It is too often forgotten that we are in almost all es-

sential things only their lawful heirs, and such will be our children's children to the last syllable of recorded time. We sometimes talk with dull misapprehension of our inheritance, as if the mingling here of the different nationalities of the earth was a mere accident of our own time, and as if because some of our misfortunes are traceable to it, we are privileged to deny to any less fortunate brother such opportunity to seek a home upon this free and bountiful continent as our ancestors enjoyed. The truth is that the citizenship to which John Marshall was born, with all its far-reaching opportunities and inspirations, was due to just such mingling of the blood of different races as we are now witnessing. A Jesuit father is authority for the statement that eighteen different languages were spoken in what is now the city of New York two centuries ago, and probably no greater number is spoken there to-day; while as early as 1761 it was declared by a very competent authority that "the diversity of peoples, religions, nations, and languages in America is prodigious." Certainly the Dutch, the English, the French, the Germans, the Scotch, and the Swedes, Protestants and Catholics, were all self-asserting and aggressive agencies in the era of our colonization; and each stock and each creed made contributions of the greatest possible value to the foundations of the enduring structure of our nationality. Let us, therefore, always have the faith to believe that America is the heritage, not of ourselves alone, but of mankind, destined as well as fitted to receive all who come to her, and able to ameliorate their distresses, to diminish their differences, to cultivate their self-respect, and to fuse them, in the processes of the uncounted years, into one great and free and happy people.

This vast continent of America is also charged and will, I believe, always remain charged with another mission, impressed upon it by the men who settled it — that of being the refuge and the home of a true equality and of the republican form of government. It was settled and civilized and defended by men to whom the idea of privilege was abhorrent, and to whom the sense of substantial equality of opportunity was as the very breath of their lives. If in the changing circumstances of times and seasons any of the inequalities or privileges of the old world, from which they fled to the solitude of unbroken forests and the perils of savage foes, should unhappily reappear in the new world they founded, I beg you to believe they will not long find shelter here; for this entire continent has been, in counsels wiser than ours and which we could not hope to withstand if we wished, irrevocably dedicated to the common brotherhood of man in its truest and broadest sense. M. de Tocqueville long ago rightly described the controlling spirit of the youthful nation when he declared that it was “a manly and legitimate passion for equality.” That noble passion is one of the most ancient and most constant forces in civilization, and it is necessarily the inexorable foe of inequality and of privilege in all their forms. It has often been checked, often thwarted, often even defeated and overthrown; but it has had, in the end, resistless power; and it has always advanced to new and more extensive conquests. Its last and greatest conquest is the continent on which we live.

To properly estimate the true grandeur of character of any great man it is always necessary to understand his environment and the spirit of the age in which he lived. The vibrant and electric atmosphere into which

John Marshall was born and in which his youth was passed was the inevitable consequence of the memories which the colonists had brought with them from the old world to the new, and of the elevating experiences of the life of adventure, of courage, of intellectual and religious fervor which they had lived. "Not many noble, not many mighty," were enrolled in their ranks. They were people of the middle class, such as we all have continued to be, and, however reluctant some of us may be to admit it, we all are likely to remain. They did not primarily seek wealth, but they avoided poverty and acquired property by hard and honest toil. They came indeed "out of great tribulation," but often also out of great joy and buoyancy of spirit; and the fruits of their experiences were visible in their daily lives, illuminated as those lives were by that sublime spirit of sacrifice for conscience sake, which in so many of their old homes had "wrought righteousness" for them and "out of weakness had made them strong."

The men who came from Sweden, from Holland, from England, from France, and from Germany, differing in many respects — in language, in habits, in dress, in manners, — were agreed, as if of one blood and one creed, in the underlying principles of the Reformation, for which they and their fathers had suffered unspeakable afflictions; and they were agreed also in their common hatred of all tyranny, whether of church or king. They were an advance guard of a political Renaissance sent to take possession of the new world and to plant here that tree of liberty whose leaves should be "for the healing of the nations."

And as these different nationalities were commingled and were rapidly being fused into one people, the pro-

fessors of all the different religious creeds gathered here were united in their devotion to the land which gave to each of them the right to freedom of religious worship; and when John Marshall was born the American colonists, thinly scattered along the Atlantic coast from Massachusetts Bay to Georgia, were as one people slowly marching inland to take possession of the continent, and to establish a great nation resting upon the sublime truth — true yesterday, true to-day, and true forever — that “all men are created equal, that they are endowed by their Creator with certain unalienable rights, and that among these are life, liberty and the pursuit of happiness.”

What followed was as inevitable as a decree of fate, although to the courtiers of the old world, its nobles and its kings, the revolt of the new world seemed like a dislocation of the order of nature. To them, in their blindness, “the world was all so suddenly changed, so much that was vigorous was sunk decrepit, so much that was not was beginning to be. Borne over the Atlantic to the closing ear of Louis, king by the grace of God, what sounds were these, new in our centuries? Boston harbor was black with unexpected tea. Behold a Pennsylvanian congress gather; and ere long on Bunker Hill democracy, announcing in rifle volleys, death-winged, under her star banner, that she was born, and would envelop the whole world.” In truth, nothing in the evolution of the material world is more orderly than the evolution in history of the American Revolution and the American Union. They were the natural and inevitable results of the memories, the sufferings, the faith, and the aspirations of the early settlers. The British Crown lost its American colonies not because of the stamp act, or the

tax on tea, not because of the cynical statesmanship of Lord North or the immeasurable stupidity and stubbornness of the King. The future of the colonies was determined beyond recall when Luther defied the papal tyranny at Worms; when Egmont and Horn were beheaded at Brussels; when Hampden was mortally wounded on Chalgrove Field; when the Huguenots were massacred because they would not renounce their faith; when Lord Baltimore was persecuted for being a Catholic, and William Penn was persecuted for being a Quaker. The American colonists had been consecrated, in the eternal counsels, to the old, undying struggle for civil and religious freedom and were now giving the breath of life and the spirit of liberty to the new nation which was growing, day by day, into shape and strength under the imposition of their hands. As early as the year 1765, when John Marshall was only ten years old, the citizens of the county of Westmoreland, where his father had been born, wrote and signed a declaration setting forth the rights of the colonies. Before he was ten years older he had assisted in forming a company of volunteers to defend those rights by arms, of which company he was appointed a lieutenant; and then began the first labors of his life, labors which were destined to fill in fullest measure every obligation of a patriotic citizen, first as soldier, then as statesman, and last, and crowning all with illustrious and unfading renown, as jurist.

His career as a soldier, like all the other actions of his life, was of the most creditable character. It is quite true, as Gibbon says, that "mere physical courage, because it is such a universal possession, is not a badge of excellence, but he who does not possess it is sure to encounter the just contempt of his fellows." In the year

1775, when he was not twenty years old, he walked ten miles from his father's house to an appointed muster field. "He was about six feet in height, straight and rather slender, with eyes dark to blackness, beaming with intelligence and good nature. He wore a plain blue hunting shirt and trousers of the same material, fringed with white, and a round black hat with a bucktail for a cockade." When the company had assembled he told them he had come "to meet them as fellow-soldiers who were likely to be called on to defend their country and their rights and liberties invaded by the British Crown; that soldiers were called for, and that it was time to brighten up their fire-arms and learn to use them in the field." It was thus early, in the first flush of his youthful vigor, with hope on his brow and love of country and of liberty in his heart, that he stepped across the threshold which divides youth from manhood, and began that almost unexampled career of public service which continued, with ever-increasing lustre, for sixty years, and ended only with his life.

Active military duty was soon offered him, and he doubtless accepted it with that joy of expected battle which is the common heritage of all the fighting races, and which only needs a just cause, like our Revolutionary struggle, to justify and sanctify it; but for its justification and sanctity such a cause it always, and in all quarters of the world, imperatively needs. Lieutenant Marshall was soon promoted to a captaincy, and it was on the field of Brandywine, a pastoral scene then and now as beautiful as the eye ever rested on; where Lafayette first shed his blood and Wayne won his first laurels, that John Marshall fought his first battle. He also bore an honorable part at Germantown; but it was only when



the army retired to winter quarters in December, 1777, and he was appointed to act as deputy judge advocate that he came into personal relations with Washington, and began to secure that large measure of confidence and regard which thereafter steadily increased to the close of Washington's life.

The winter of 1777-1778 was one of the decisive epochs in the history of mankind. Washington commanded but a small army, often in need of food, always in need of clothing, never with adequate shelter against the bitter cold, never properly armed; but those soldiers found food and clothing and shelter and arms in the sacred fire of liberty, which burned brightly in all breasts. Their awful and appalling sufferings and sacrifices were irradiated with

"A light which never was on sea or land,"

enabling them to forecast the future and to behold, as in prophetic vision, their country taking her place among the independent nations of the earth as the result of their courage and fidelity. The words of Aristotle, which come to us across the centuries, are true of every soldier there from the commander-in-chief to the private in the ranks: "Beauty of character shines thoroughly when one is seen bearing with patience a load of calamity, not through insensibility, but through nobleness and greatness of heart."

That was indeed a time which "tried men's souls" and tried, almost to the point of breaking, the great heart of him who bore alone the responsibility, which he could not share with any other, for the success of the war, and the maintaining of that independence which had been so bravely proclaimed. We now know something of the fortitude Washington displayed in that long and trying

winter, and while we never can enter into the bitterness of soul he must have experienced from the cabals he discovered, the ingratitude he ignored, the calumny he withstood, the sufferings he could not prevent, we are sure he often rose to the true appreciation of the great work he was doing for us and for all men; and pacing his lonely chamber when all the camp around him was wrapped in silence and in slumber "save where on some rampart a ragged sentinel, crunching the crisp snow with bleeding feet, kept watch for liberty," he must have known it was ordained that "the gates of Hell should not prevail" against him, for that was the Continental army and those were the hills of Valley Forge.

Mr. Burke tells us how an angel, lifting the curtain which hid the future from the gaze of the youthful Lord Bathurst, might have said to him, "Young man, there is America, which at this day serves for little more than to amuse you with stories of savage men and uncouth manners, yet shall before you taste death show itself equal to the whole of that commerce which now attracts the envy of the world; and whatever England has been growing to in seventeen hundred years, you shall see as much added by America in the course of a single life."

As two Virginian youths lay sleeping in their huts that winter at Valley Forge, I wonder if any such forecast of their country's future, or any forecast of their own, came to them in their dreams. Of these youths one was John Marshall, who was destined to lay broad and deep the foundations of his country's greatness, and thereby assist to secure the glory and the blessings of free institutions to untold generations of men; and the other was James Monroe, who was destined to proclaim the truth that this whole American continent, from end to end, and from sea to sea,

must be regarded by all other nations as dedicated to liberty and to bequeath to us the duty of giving practical and complete effect to the noble and inspiring doctrine which bears his name.

From Valley Forge John Marshall followed the varying fortunes of Washington's command through the year 1778 and on June sixteenth, 1779, he was with General Wayne in the assault and capture of Stony Point, an achievement which Charles Lee declared was "the most brilliant in the whole course of the war."

Immediately after the surrender at Yorktown Mr. Marshall's career as statesman began, for he had been previously elected a member of the General Assembly of Virginia, and his labors in peace were governed by the same object which inspired him as a soldier — that of moulding the colonies into one great and strong republic. His experience in the army of the evils attendant upon a divided authority had convinced him of the necessity of one general government over all the States, possessing ample authority to insure the general safety, to promote the general welfare, and to perpetuate in peace the blessings of liberty secured by the war. He says he had imbibed these sentiments so thoroughly that they became a part of his being, and as in the army he was associated "with brave men from different States who were risking life fighting in a common cause believed by them to be most precious, I was in the habit of considering America as my country and Congress as my government." From that habit he never departed to the last hour of his life.

The brilliancy, the wisdom, and the enduring value of his contributions to the welfare of his country as Chief Justice have naturally diverted attention from his valuable and fruitful labors as a statesman, but those labors

ought never to be forgotten, as they help to exhibit in its true proportions that consistency of opinion which made him, from first to last, such a powerful factor on the side of liberty and Union. He was re-elected to the State legislature in 1784 and again in 1787, and in the following year he was chosen a member of the convention called to reject or to ratify the Constitution of the United States. This last election clearly resulted from his personal popularity, as not only the State of Virginia, but also the county of Henrico, which elected him, was opposed to the adoption of the Constitution. He had always been the earnest advocate of its adoption, and he was "eminently fitted by his character and temper to secure without solicitation, and to retain without artifice, the public esteem. His placid and genial disposition, his singular modesty, his generous heart, his kindly and unpretentious manners, the scrupulous respect he showed for the feelings of others, his freedom from pride and affectation, his candor, and his integrity, conciliated the confidence and fixed the regard of his fellow-men."

The convention, in which he was to display these qualities for the advantage of his country, met at Richmond the second day of June, 1788, and presented an assemblage of men rarely if ever surpassed in the qualities most honored in deliberative assemblies, the qualities of eloquence, experience, and character. Among its members were Patrick Henry and George Mason, Edmund Pendleton and James Madison, Edmund Randolph, George Nicholas, and Henry Lee. It was in such company that John Marshall, by the massive strength of his great arguments on behalf of the Union and the Constitution, succeeded in securing victory for them while

extorting from his earnest and eloquent opponents extraordinary tributes of respect and regard.

Mr. Marshall was, throughout Washington's administration, its thorough and earnest supporter, and notwithstanding the almost universal unpopularity of the treaty Mr. Jay had negotiated with England, Mr. Marshall fearlessly advocated its ratification, demolishing, once for all, in a profound legal argument before the people of Richmond, the proposition that the Constitution, in giving Congress the power to regulate commerce, denied to the President the right to negotiate a commercial treaty. He was again elected to the General Assembly in 1795, and on the thirty-first day of May, 1797, was appointed one of the three special envoys President Adams was sending to France in the hope of preserving peace with that country, while maintaining the dignity and honor of his own. 'The sordid nature of the negotiations of the Directory, conducted through Talleyrand and his agents, was fully exposed, when it was shamelessly declared by them that to maintain peace it was "necessary to pay money — a great deal of money," and to this demand the true American answer was given at the banquet tendered Mr. Marshall on his return from his mission by members of the Congress then sitting at Philadelphia:

"Millions for defense, but not a cent for tribute."

His bearing through all the painful and disagreeable experiences of this mission justified the message Patrick Henry sent him: "Tell Marshall I love him because he acted as a republican and as an American." Those were indeed the two guiding and controlling convictions of his whole life—he was always an ardent republican and he was always an ardent American; and his mas-

terly conduct of the negotiations with the Directory is another striking instance of the truth that, since this country became a nation, no other country has been as wisely and successfully served by its diplomatic representatives as the United States. Of Mr. Marshall's conduct of those negotiations President Adams declared: "It ought to be marked by the most decided approbation of the public. He has raised the American people in their own esteem; and if the influence of truth and justice, reason and argument, is not lost in Europe, he has raised the consideration of the United States in that quarter."

Mr. Marshall's next public service was as a member of the last Congress which sat in Philadelphia, meeting in December, 1799, and which body, so competent a judge as Horace Binney has declared, "was perhaps never excelled in the number of its accomplished debaters or in the spirit for which they contended for the prize of the public approbation." In announcing the death of Washington, Mr. Marshall seems to have anticipated in some degree the doctrine afterwards associated with the name of President Monroe. He declared that "Washington was the hero, the patriot and the sage of America, and that more than any other agency he had contributed to found this wide-spreading Empire, and to give to the Western World independence and freedom."

However improbable such an occurrence may now appear, it is undoubtedly true that Mr. Marshall changed the current of opinion upon a grave constitutional question by a speech in Congress, although it is true that his argument in the Robbins case, so far from being an ordinary speech in debate, has all the merit and nearly all the weight of a judicial decision. It separates the ex-

ecutive from the judicial power by a line so distinct and a discrimination so wise that all men can understand and approve it. He demonstrated that, under the circumstances, the surrender of Robbins to the British authorities was an act of political power, which belonged to the executive department alone; and before the session closed he was privileged to teach his associates as well as his successors in Congress, by a striking example, how, when the convictions of the individual conscience conflict with the behests of party, a true patriot will follow the former, in utter disregard of party discipline, and of possible calamitous consequences to his future political advancement. Although a strong supporter of President Adams' administration, Mr. Marshall voted without hesitation, contrary to the earnest desire of the President and in direct opposition to all those with whom he was in general political accord. Believing that the second section of "The Alien and Sedition Laws" ought to be repealed, he voted accordingly, and it has long since been universally acknowledged that he was right. Among other lessons he had learned from Washington was this: "The spirit of party unfortunately is inseparable from our nature, having its root in the strongest passions of the human spirit, but in governments of the popular form it is seen in its greatest rankness and is truly their worst enemy."

So far from Mr. Marshall's independence of party having estranged President Adams, he very soon afterwards appointed him Secretary of State, and the duties of this important office he discharged with the same wisdom and firmness he had displayed in all other public stations. The right then asserted by both France and Great Britain, while at war with each other, to interfere

in our affairs and to compel us to ally ourselves with the one or the other of the combatants, was denied in a dispatch which will always hold high rank among the important state papers of America. He said: "The United States do not hold themselves in any degree responsible to France or to Great Britain for their negotiations with one or the other of those powers. The aggressions sometimes of the one and sometimes of the other have forced us to contemplate and prepare for war. We have repelled, and will continue to repel, injuries not doubtful in their nature and hostilities not to be misunderstood." With this clear and vigorous statement of the true position of his country he closed his career as a statesman.

He must have found that career singularly interesting and fruitful. In the legislature of his native State; in its constitutional convention; in the special mission to the French Directory; as a member of Congress, and as Secretary of State, he had been brought into association with almost every member of that great galaxy of statesmen to whose wisdom, integrity and patriotism we are indebted for the priceless blessings of liberty and union which we now enjoy, and those associations had undoubtedly broadened and widened and deepened his opinion of the true character of the National Government, and assisted to give to his judgments that stately impress, alike of consistency and of conclusiveness, which they maintained to the end.

On the fourth day of February, 1801, just a hundred years ago, he took his seat as Chief Justice of the Supreme Court of the United States. Soldier he had been and statesman, and now for the rest of his life he was dedicated to the administration of the law. Fortunately he



came to this great office, which is among the greatest possible to be held by man, in the full maturity of his intellectual powers, and admirably equipped to meet every demand which might be made upon him. He was first of all a thorough lawyer, thoroughly well grounded in legal principles, and thoroughly familiar with the decisions of the courts in England and at home, and possessed of the incalculable advantage of having tried and argued many unimportant as well as many important causes; for he had been engaged in active, laborious, and miscellaneous practice at the bar for twenty years. His public duties, with one exception of his brief special mission to France, had not withdrawn him from the scene of his professional labors, or seriously interfered with his devotion to them. He had risen rapidly at the bar, for the legal questions then to be discussed were novel in their character, and counsel in the argument of such causes were obliged to reason from general principles and seek to apply considerations of abstract justice, so that the needs of the time and the character of his mind were in most happy accord. He had enjoyed the advantage of practising for several years at the bar of Fauquier county and in the adjacent counties, where he had acquired not only a considerable practice, but also that familiarity with the different branches of the law and their practical application which is far more slowly and far less easily attained in a city. When, therefore, he removed to Richmond it is not surprising that he rapidly advanced to the position of the acknowledged leader of its bar. The secret of his success was explained by Mr. Wirt: "This extraordinary man, without the aid of fancy, without the advantages of person, voice, attitude, gesture, or any of the ornaments of the orator, deserves to be considered

one of the most eloquent men in the world, if eloquence may be said to consist in seizing the attention with irresistible force and never permitting it to elude the grasp until the hearer has received the conviction which the speaker intends. He possesses one original and almost supernatural faculty: the faculty of developing a subject by a glance of his mind and detecting at once the very point on which every controversy depends."

The services of such an advocate were sure to be in great request, and the Duc de Liancourt, in his "Travels in America," speaks of him as being "the most esteemed and celebrated counselor" at the Richmond bar; and it was from his acknowledged leadership of that bar that he was appointed to be Chief Justice of the United States.

I have dwelt upon these steps of his advance from his admission to the bar in 1780 to his national reputation as an eminent lawyer in 1801, because it has always seemed to me there was danger of overlooking his rank at the bar, at the time of his appointment, because of the inestimable value of his services on the bench where for more than thirty years he proclaimed and established the true canons of construction to be applied to the Constitution.

It is hardly possible for us at the beginning of the century just opening to appreciate the difficulties and the dangers which confronted the nation at the beginning of the century which has just closed. We are now secure of citizenship in a great, powerful and free nation, whose authority upon all questions affecting the national welfare is subject only to such constitutional limitations as the sovereign people have imposed. We are, in very sober truth, rich in resources beyond the dreams of any visionary, with all the material blessings the heart of man can

desire, clad in full panoply for peace or war, and enjoying a moral leadership of all the nations of this vast and undeveloped continent, which is destined soon to be the home of hundreds of millions of people of all creeds and of all races, blended and fused into a peaceful confederacy of American republics. How different was the outlook a hundred years ago! A small and scattered population was then slowly making its way from the Atlantic coast into the wilderness of the valley of the Ohio, and thereby separating itself by the almost impassable barrier of the Alleghanies from the settlements on the seaboard. The Constitution, as well as the Government created by it, was only twelve years old, and in that brief period eleven amendments of its provisions had been found to be necessary. A general distrust existed of its wisdom, and in many States there was an active and bitter hostility to it, magnifying its few imperfections and denying its manifold and transcendent merits. Party spirit, then as ever since our greatest peril, exulted in the prospect that it would soon be apparent that the Constitution was incapable of solving the almost insoluble problem of reconciling the rights of thirteen self-governing and independent communities, each differing in many respects from every other, with such sovereignty in the General Government as was indispensable to the perpetuity of the free institutions confided by the fathers to its sheltering care, in those noble and memorable words graven by them, as with a pen of iron, over the entrance to the sources of the fundamental law, and which cannot be too often repeated, in which they declared that the Constitution was "ordained to form a more perfect union, establish justice, insure domestic tranquillity, provide for the

common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.”

The new nation stood at a parting of the ways, divided as in twain by two great contentions, each supported by names of imposing weight and authority, one party insisting that the National Government was a sovereign nation created by the people of the United States and subject as such sovereign nation only to the limitations of the Constitution,— limitations which the people had imposed and which they alone could alter or remove. The other party insisted that the National Government was merely the accredited agent of thirteen independent sovereignties, which had delegated to such agent certain strictly defined powers which the States were at liberty to abrogate or withdraw, at their own good will and pleasure.

It is now universally realized that the decision of the question thus distinctly put in issue was one of the most important ever submitted to human judgment; and if it is regarded as an accident that at such a crisis in the history of free institutions John Marshall was chosen to be Chief Justice of the Supreme Court of the United States, then chance was as wise and far-seeing as any divine guidance of a nation could have been. It is true that it was an era of great statesmen and of great lawyers, broad-minded, high-hearted men, true patriots if ever such there were. We know them now possibly better than if we had lived with them, as we linger lovingly and proudly over the minutest details of their daily lives, but we know that among them all the fittest man for the great and enduring work then needing to be done was the man who was summoned to do it. Mr. Webster wrote of him years afterwards, “I have never seen a man of whose intellect I have

a higher opinion," and his intellect never served him to better purpose than when he declared the wise and moderate doctrine that the Constitution should not have either a strict or a liberal construction, but one giving the natural and ordinary effect to its words. He said: "The intention of the instrument must prevail. This intention must be gathered from its words. Its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended, and those provisions are neither to be restricted into insignificance nor extended to objects not comprehended in them, nor contemplated by its framers."

To those memorable words are to be added these others equally memorable: "That this court dares not usurp power is most true. That this court dares not shrink from its duty is not less true;" and these declarations guided him, as with beacon lights, through his entire judicial career. Of these propositions no criticism could really be offered, nor from them was any appeal to either passion or prejudice possible. They enabled the Chief Justice to rear upon them that enduring structure of the true meaning of the Constitution which is among the most priceless possessions of our inheritance, and which will enable coming generations to enjoy our privilege of living under a government of liberty regulated by law.

Soon after Mr. Marshall's entrance upon the duties of Chief Justice the Supreme Court was confronted with one of the most important questions ever submitted to any tribunal for decision: Was the extent and scope of the limitations the Constitution imposed upon the authority of the legislative department of the Government of the United States to be determined by its judicial department? Might the latter declare null and void, as in con-

flict with such limitations, a law deliberately enacted by the former? Many strong reasons existed for supposing this could not have been intended. One was because all legislative authority was expressly vested in Congress. Another was because the members of Congress represented the people and held direct and explicit mandates from them, renewed at briefly recurring intervals, to enact such laws as they judged to be wise and necessary. On the contrary, the justices of the Supreme Court were the nominees of the President, and enjoyed tenure of office during their lives. The assertion that the latter were at liberty to annul and set aside the legislation enacted by the former seemed to many ardent and sincere patriots a proposition destructive of the division of the powers of the government into three departments of co-ordinate dignity and authority. But listen to the calm and resistless strength with which the Chief Justice established on impregnable foundations the true doctrine: "The question whether an act repugnant to the Constitution can become a law of the land is a question deeply interesting to the United States, but happily not of an intricacy proportioned to its interest. If an act of the legislature repugnant to the Constitution is void, does it not, withstanding its invalidity bind the courts and oblige them to give it effect? Or in other words, though it be not a law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory and would seem at first an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration. It is emphatically the province and duty of the judicial department to say what the law is. If two laws conflict with each other the courts must decide on the operation of each. So if a

law be in opposition to the Constitution, if both the law and Constitution apply to a particular case, so that the court must either decide that case conformably to the law disregarding the Constitution, or conformably to the Constitution disregarding the law, the court must determine which of these conflicting rules governs the case. That is of the very essence of judicial duty. If then the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."

In deciding that the judicial authority of the court extended to the issuing of process to the President, he settled for all time the subjection of the head of the executive department to the law; and he effectually disposed of the argument that as the King of Great Britain was not subject to such process the President of the United States ought not to be, by saying:

"Of the many points of difference which exist between the first magistrate of England and the first magistrate of the United States, in respect to the personal dignity conferred on them by the Constitutions of their respective nations, the court will only select two. It is a principle of the English Constitution that the King can do no wrong; that no blame can be imputed to him; that he cannot be named in debate. By the Constitution of the United States the President as well as every other officer of the government may be impeached and may be removed from office for high crimes and misdemeanors. By the Constitution of Great Britain the Crown is hereditary and the monarch can never be a subject. By the Constitution of the United States the President is elected from the mass of the people, and on the expiration of the

time for which he is elected he returns to the mass of the people again."

By a course of reasoning equally irresistible he subjected the lawfulness of the ministerial acts of members of the Cabinet to the decision of the courts: "The Government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to secure this high appellation if the laws furnish no remedy for the violation of a vested legal right. The very essence of civil liberty consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. By the Constitution of the United States the President is invested with certain important political powers, in the exercise of which he is accountable to his country in his political character and to his own conscience. To aid him in the performance of those duties he is authorized to appoint certain Cabinet officers, and so long as the subjects of their action are political, there exists no power to control their discretion, which is the discretion of the President. But when Congress imposes upon a Cabinet officer other duties and directs him to perform certain acts, when the rights of individuals are dependent on the performance of those acts, he is so far the officer of the law; is amenable to the law for his conduct; and cannot at his discretion sport away the vested rights of others."

Mr. Justice Story tells us that these epoch-making judgments were "the results of his own unassisted meditations." They established upon a basis which can never be successfully assailed that both the legislative and executive departments were subject to the law, which is the only enduring basis of government in the democratic



ages. If the law could lay no restraining hand upon Congress, Congress would be a despotism. If the law could lay no restraining hand upon the President and the members of his Cabinet, they would be despots. It is because neither the President nor Congress, nor the highest nor the humblest citizen of the land, is either above the restraints, or beneath the protection, of the law that ours is destined to be the final form of government, as notwithstanding all its defects it is by far the best form of government under which men have ever been permitted to live. For of law in its widest sense, including the processes of evolution, not only in the material universe, but in the moral and spiritual universe as well, the familiar words of Hooker are always true: "There can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world. All things in heaven and earth do her homage, the very least as feeling her care, and the greatest as not exempt from her power."

The other labors of Chief Justice Marshall, in giving definite form and meaning to the provisions of the Constitution, were only comparatively less difficult and important; and we must not lessen our gratitude to him by failing to appreciate the gravity of those decisions and their steadily increasing influence in our national life. "We admit," he said, "as all must admit, that the powers of the Government are limited and are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means, by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let

the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

Having settled the undoubted right of Congress to determine, in its unfettered discretion, what means were necessary to give effect to the powers the Constitution conferred upon it, he next addressed himself to securing for the means thus employed absolute freedom from interference by the authority of any State. He said that while there was no express provision on the subject the proposition rested "on a principle which so entirely pervades the Constitution, is so intermixed with the material which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds. If the States may tax one instrument employed by the General Government they may tax all the means employed by it, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their Government dependent on the States. The question is indeed a question of supremacy. The court has bestowed on the subject its most deliberate consideration. The result is a conviction that the States have no power by taxation or otherwise to retard, impede, burden, or in any manner control the operation of the constitutional laws, enacted by Congress, to carry into execution the powers vested in the General Government. This is, we think, the inevitable consequence of that supremacy which the Constitution has declared."

His next great step forward was to withdraw the obligations of contracts from the power of the State legislatures to impair their validity, and to place them also beneath the protecting ægis of the Constitution. He said: "This court can be insensible neither to the magnitude nor to the delicacy of this question. The validity of a legislative act is to be examined, and the opinion of the highest law tribunal of a State is to be revised. But the American people have said, in the Constitution of the United States, that no State shall pass any law impairing the obligation of contracts. In the same instrument they have also said that the judicial power shall extend to all cases, in law and equity, arising under the Constitution. On the judges of this court is imposed the solemn duty of protecting, from even legislative violation, those contracts which the Constitution of our country has placed beyond legislative control; and, however irksome the task may be, this is a duty from which we dare not shrink."

It is now recognized that one of his greatest services to his country was in withstanding a wave of great popular excitement, shared and fostered by President Jefferson himself, and declaring the true doctrine of the Constitution to be, that no man can be convicted of treason against the United States unless he is proven by the testimony of two witnesses, to the same overt act of levying war against the nation, or of adhering to its enemies. In discharging this grave duty he recognized fully the obloquy to which he was exposing himself. "No man," he said, "is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom.

But if he has no choice in the case, if there is no alternative presented to him but a dereliction of duty, or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace."

In the years to come it will probably be recognized that among his decisions none will surpass in permanent material advantage that decision which determined that the power to regulate commerce resided exclusively in Congress and must be kept inviolate from any intrusion by the States, under any guise whatsoever. He refused to admit that any rights possessed by the States may be used so as to obstruct the free course of a power given to Congress. "We cannot admit," he said, "it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed that the powers remaining with the States may be so exercised as to come in conflict with those vested in Congress. When this happens that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the Constitution has applied it to the often interfering powers of the general and state governments as a vital principle of perpetual obligation. No power of legislation in the States can be allowed to restrain or interfere with any law which Congress may constitutionally pass,— it cannot interfere with any regulation of commerce."

I have felt it was due to this great jurist to allow him to state his conclusions, as expounder of the Constitution, in his own clear and persuasive language. For more than half a century the principles vindicated by

own lofty standard of the judicial character was, however, never relaxed. In the closing years of his life, as a member of the convention called to revise the constitution of his native State, he said: "I have always thought, from my earliest youth till now, that the greatest scourge an angry heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt or a dependent judiciary. Our ancestors thought so, we thought so until very lately, and I trust the vote of this day will show we think so still, and that we will not draw down this curse upon Virginia."

Let us fervently hope no such curse may ever be drawn down upon the United States. In a popular government like ours, resting upon manhood suffrage, the forces of the reserve in the army of civilization must always be the judicial tribunals. It is upon them as our only refuge in the days of evil fortune that our rights to property, to liberty, and to life must in the last resort depend, and as long as the plain people have undiminished confidence in the integrity and impartiality of their judges, those rights will be secure, but no longer.

Shortly before his death, in reply to an address from the bar of Philadelphia declaring that he had "illuminated the jurisprudence of his country and enforced with equal mildness and firmness its constitutional authority," the Chief Justice replied, with his unvarying modesty, that "if he might be permitted to claim for himself any part of their approval, it would be that he had never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the fullest extent that duty required" — thus firmly maintaining to the end the two guiding principles with which he began his judicial career.

And now at last the long and spotless record of labor, of honor, and of life was completed, and in Philadelphia, on the sixth day of July, 1835, John Marshall entered into rest. It is impossible to describe the impression which his death produced. It was not that feeling which the death of a public man in an ordinary sense of the word produces, which stirred the hearts of the people,—“it was a better, a purer and more tranquil sentiment,”—a mingled feeling of gratitude for the past and of security for the future.

The bar of Richmond has left an enduring record of their appreciation of him, and of their veneration for him, which seems to me the best portrait of a perfect judge ever drawn. They declare that he was “never absent from the bench in term time even for a day; that he displayed such indulgence to counsel and suitors that everybody’s convenience was consulted but his own; that he possessed a dignity sustained without effort, and apparently without care to sustain it, to which all men were solicitous to pay due respect; that he showed such equanimity, such dignity of temper, such amenity of manners that no member of the bar, no officer of the court, no juror, no witness, no suitor, in any single instance, ever found or imagined, in anything said, or done, or omitted by him, the slightest cause of offense.” They added that “his private life was worthy of the exalted character he sustained in public station, and that the spotless purity of his morals, his social, gentle, cheerful disposition, his habitual self-denial and his boundless generosity towards others, caused him to be, highly as he was respected, yet more beloved.”

He had indeed completed the circle of a good man’s duties as husband and father, as citizen and soldier, as

statesman and jurist; and he has left to all the coming generations of his countrymen an inspiring example of a happy union of wisdom and virtue and patriotism. Two generations of American citizens have come and gone since the nation stood by his open grave, and if we have not profited as we ought to have done by the lessons of his life, we have not wholly failed to realize the lofty ideals he cherished for us. We are in a far greater degree than he foresaw a powerful, prosperous and united people, loyally accepting his construction of the fundamental law as the source of the national life, and still venerating the Constitution in his own measured words, as "a sacred instrument;" and we have lived to see diffused through all sections of our country and among all classes of our countrymen such generous measures of political equality, of social freedom, and of physical comfort and well-being as were never dreamed of on the earth before.

But while our hearts are full of gratitude for these unexampled material blessings, let us, on this day of all days, when the memories of the fathers cluster so closely about us, acknowledge, as they always acknowledged, that nations cannot live by bread alone. It was because of such conviction that they cherished, and we have heretofore cherished, the Christian ideal of true national greatness; and our fidelity to that ideal, however imperfect it has been, entitled us in some measure to the divine blessing, for having offered an example to the world for more than an entire generation of how a nation could marvelously increase in wealth and strength and all material prosperity while living in peace with all mankind. And although many good and thoughtful people are just now greatly troubled at what seems to them an evil promise

of the future, we must never for a moment, in dark days or in bright, despair of the republic. Differences of opinion may well exist as to the best methods of discharging the grave and serious duties unexpectedly devolved upon us by a war begun with the noble object of helping a struggling people to secure their independence; but let us trust that however we may differ as to methods we all believe that the true glory of America and her true mission in the new century, as in the old, is what a great prelate of the Catholic Church has recently declared it to be: to stand fast by Christ and his gospel; to cultivate not the Moslem virtues of war, of slaughter, of rapine, and of conquest, but the Christian virtues of self-denial and kindness and brotherly love, and that it is our mission, not to harm but to help to a better life every fellow-creature of whatever color and however weak or lowly; and then we may some day hear the benediction: "Inasmuch as ye have done it unto one of the least of these my brethren ye have done it unto me."

The passing years bring with them great compensations, and among them is a serenity of judgment which enables us to recognize as literal practical truth that, however we may strive to persuade ourselves to the contrary, no nation ever has gathered or ever will gather grapes of thorns or figs from thistles; and, as the sense of separation of the world in which we are from the world whither we are going lessens day by day, we come at last to believe with a faith which never can be shaken that the true mission of nations as of men is to promote righteousness on earth; that conferring liberty is wiser than making gain; that new friends are better for us than new markets; that love is more elevating than hatred; that peace is nobler than war; that the humblest



human life is sacred; that the humblest human right should be respected; and it is only by recognizing these truths, which can never fail to be true, that our own beloved country can worthily discharge the sacred mission confided to her and maintain her true dignity and grandeur, setting her feet upon the shining pathway which leads to the sunlit summits of the olive mountains and taking abundant care that every human creature beneath her starry flag, of every color and condition, is as secure of liberty, of justice and of peace as in the Republic of God.

In cherishing these aspirations and in striving to realize them, we are wholly in the spirit of the great Chief Justice; and we can in no other way so effectually honor his memory as by laboring in season and out of season to make this whole continent of America "one vast and splendid monument, not of oppression and terror, but of wisdom, of peace and of liberty, on which men may gaze with admiration forever."

## COMMONWEALTH OF VIRGINIA.

John Marshall Day was celebrated in Richmond under the auspices of the Virginia State Bar Association and the Richmond City Bar Association. The principal exercises were held in the Academy of Music at four o'clock in the afternoon. A contemporary account of the proceedings states that the stage and boxes were beautifully and appropriately decorated. The stars and stripes and the white and blue of Virginia's emblem were in every available spot—festooned above the stage front, suspended at the rear, draping the fronts of the boxes. At the rear of the stage was an old portrait of Marshall in oil, surrounded by the white, red and blue of the national emblem, at the top the coat-of-arms of Virginia, flanked by the stars and stripes. The stage was decorated with palms, and the speakers' stand was almost obscured by flowers.

On the stage were many distinguished men. Hon. Beverly B. Munford presided. On his right sat Judge James Keith; on his left, Mr. Justice Gray.

The boxes on the left of the stage were occupied by the following descendants of Marshall: Misses Annie and Emily Harvie, Lizzie Archer, Mrs. Ellen Barton, Mr. and Mrs. Alex. H. Sands, Mr. and Mrs. R. H. Smith, Mrs. Ellen Wade, Mrs. A. E. Jordan, Miss Douthat, Mrs. Landon R. Mason, Miss Nannie B. Norton and J. K. M. Newton, Jr. Descendants of Marshall on the left were Col. R. C. Marshall, Marshall Norton and

Hon. W. L. Royall, also Judge James Keith, a collateral descendant.

Nearly all the members of the General Assembly of Virginia were in the audience. Representatives of the bar from all over the State, as well as a very full representation from the Bar Association of Richmond, were present; perhaps the ladies formed more than one-third of the audience. The Academy was crowded to the gallery.

After the orchestra played "The Star Spangled Banner," Hon. Beverly B. Munford introduced Rev. Dr. William E. Evans, of the Monumental Episcopal Church, who invoked the Divine blessing. Mr. Munford then presented Judge James Keith, President of the Virginia Supreme Court of Appeals.

**Mr. Munford's Remarks.**

We have assembled at the call of the Virginia State Bar Association and the Bar Association of the City of Richmond to do honor to the august memory of John Marshall, and to celebrate the one hundredth anniversary of his elevation to the office of Chief Justice of the Supreme Court of the United States. The exalted character of the man, no less than the great import of the event, inspired the call, while the enthusiasm of the people's response demonstrates the popular sympathy in this commemoration. To-day throughout the length and breadth of this land a grateful people takes reckoning of what the life and labors of John Marshall have meant to the Republic.

The Nation stands radiant, yet awe-struck, at the prospect of its present powers and regal responsibilities. Be-

hind we mark the path of our country's progress, illumined by the terrors of its trials and the splendor of its triumphs. Beyond, stretches the future, for whose problems we know no chart nor compass save the principles and practices which have brought the Republic in safety and honor to this auspicious hour. Fortunate, indeed, that in this the opening year of the dawning century, our people have been summoned to study anew the work of the great Chief Justice, and his enduring contributions to the cause of constitutional liberty.

In the early days of the century just closed, a great son of Massachusetts called this Virginian to the high office of Chief Justice of the Supreme Court of the then new-made republic. At Virginia's call another great man from the land of the Pilgrims has come to the Commonwealth of the Cavaliers to recount the labors and triumphs of her illustrious son. His presence here to-day is a fresh assurance of the return of that fraternal spirit which animated the people of these two great States during the heroic days from Concord to Yorktown. To present this orator we have most appropriately selected the highest judicial officer of the Commonwealth. The county of Fauquier, pre-eminent in the annals of Virginia for men strong of mind and valiant of heart, gave to exalted citizenship and jurisprudence the illustrious Chief Justice whose memory we honor to-day. In these latter years she has sent forth another son, James Keith, President of Virginia's Supreme Court, who illustrates in his character and attainments the best traditions of his county and Commonwealth, and whom I now have the privilege of presenting to this audience.

**Judge Keith's Address.**

The great Alexander exclaimed as he stood at the tomb of Achilles: "Oh, fortunate man! who found a Homer as the herald of your heroic deeds!" And truly; for had not the Iliad survived, the tomb which held his body would have buried his very name.

He whose life work we are here to commemorate has been scarcely less happy. To have borne a great part in one of the most stupendous achievements in the world's history; to have shared in the formation, influenced the development and impressed his mind and character upon the institutions and laws of these United States, was the supreme good fortune and the transcendent merit of John Marshall. No Homer, indeed, has sung his story in immortal verse. The labor of the jurist offers no congenial theme to the poet, but the muse of history will find in the opinions of the Supreme Court the record of Marshall's work which has earned for him undying fame as the "Great Chief Justice" and which constitutes a monument to his memory more enduring than brass.

In life he was cheered by the affection and aided and strengthened by the genius and learning of a great son of Massachusetts, and their names are indissolubly linked together in the memory of men. Who can think of Marshall whose next thought is not of Story? They labored together in faithful and appreciative friendship, and their luminous judgments shine upon us with the blended light of a double star.

A hundred years have passed. Time and fate have established and vindicated the principles for which they together wrought, and to-day another great son of the same fruitful mother, an illustrious member of that high

tribunal, in whose presence we seem to realize the poet's vision, where

"Sovereign law, the State's collected will,  
O'er thrones and globes elate  
Sits empress, crowning good, repressing ill,"

honors us by his presence.

O! Fortunate man! I can but exclaim, who had Story as a friend and co-worker, and whose career after so many years is a theme worthy of Mr. Justice Gray, of Massachusetts.

**Address of Justice Horace Gray.<sup>1</sup>**

*Gentlemen of the Bar of the Commonwealth of Virginia,  
and of the City of Richmond:*

One hundred years ago to-day, the Supreme Court of the United States, after sitting for a few years in Philadelphia, met for the first time in Washington, the permanent capital of the Nation; and John Marshall, a citizen of Virginia, having his home in Richmond, and a member of this bar, took his seat as Chief Justice of the United States.

In inviting a citizen of another ancient Commonwealth to take part in your commemoration of that epoch in our national history, by addressing you on the Life, Character and Influence of Chief Justice Marshall, you have been pleased to mention that it was President John Adams, of Massachusetts, who gave Chief Justice Marshall to the Nation, and that I am a citizen of Massachusetts and a member of the court over which Chief Justice Marshall

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<sup>1</sup> This address was published with the following title: "An Address on the Life, Character and Influence of Chief Justice Marshall, delivered at Richmond on the fourth day of February, 1901, at the request of the State Bar Association of Virginia and the Bar Association of the City of Richmond, by Horace Gray."

presided; and to refer to the most cordial relations formerly existing between your State and my own, now happily restored, and, as we all trust, being re-established in a closer degree.

Heartily reciprocating your kindly sentiments, and deeply touched in my inmost feelings and convictions, your invitation has had the force of a summons that could not be gainsaid.

Permit me, in this connection, to recall one or two allusions by Marshall himself to the sympathy which existed between Virginia and Massachusetts in the trying times of the Revolutionary War and of the Continental Congress.

In the earliest known speech of his (as described by a kinsman who heard it), made in May, 1775, when he was under twenty years old, upon assuming command as lieutenant of a company of the Virginia militia, he told his men "that he had come to meet them as fellow-soldiers, who were likely to be called on to defend their country, and their own rights and liberties invaded by the British; that there had been a battle at Lexington in Massachusetts, between the British and Americans, in which the Americans were victorious, but that more fighting was expected; that soldiers were called for, and that it was time to brighten their fire-arms, and learn to use them in the field."

Many years afterwards, in a letter to a friend (quoted by Mr. Justice Story, to whom it was perhaps addressed), he wrote: "When I recollect the wild and enthusiastic notions with which my political opinions of that day were tinged, I am disposed to ascribe my devotion to the Union, and to a government competent to its preservation, at least as much to casual circumstances as to judgment. I had grown up at a time when the love of

the Union, and the resistance to the claims of Great Britain, were the inseparable inmates of the same bosom; when patriotism and a strong fellow-feeling with our suffering fellow-citizens of Boston were identical; when the maxim, 'United we stand; divided we fall,' was the maxim of every orthodox American. And I had imbibed these sentiments so thoroughly, that they constituted a part of my being. I carried them with me into the army, where I found myself associated with brave men from different States, who were risking life and everything valuable in a common cause, believed by all to be most precious; and where I was confirmed in the habit of considering America as my country, and Congress as my government."

Before the adoption of the Constitution, one of the chief defects in the government of the United States was the want of a national judiciary, of which there was no trace other than in the tribunals constituted by the Continental Congress, under powers specifically conferred by the Articles of Confederation, for the decision of prize causes, or of controversies between two or more States.

Among the objects of the Constitution, as declared in the preamble, the foremost, next after the paramount aim "to form a more perfect Union," is to "establish justice." It ordains that the judicial power of the United States shall be vested in "one Supreme Court," and in such inferior courts as Congress may from time to time establish; that the judicial power shall extend to "all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority," and to other classes of cases specified; that the Supreme Court, in cases affect-



ing ambassadors, public ministers and consuls, or to which a State shall be party, shall have original jurisdiction; and, in all the other cases before mentioned, shall have appellate jurisdiction, with such exceptions and under such regulations as Congress shall make; and that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

On the 24th of September, 1789, the first Congress under the Constitution passed the Judiciary Act, which had been framed by Oliver Ellsworth, then a Senator from Connecticut. That act has always been regarded as a contemporaneous construction of the Constitution; and, with some modifications, remains to this day the foundation of the jurisdiction and practice of the courts of the United States. It provided that the Supreme Court should consist of a Chief Justice, and of five Associate Justices who should have precedence according to the date of their commissions; established the Circuit and District Courts; defined the jurisdiction, original and appellate, of all the Federal courts; and empowered the Supreme Court to reexamine and reverse or affirm, on writ of error, any final judgment or decree, rendered by the highest court of a State in which a decision in the case could be had, against a right claimed under the Constitution, laws or treaties of the United States.

President Washington, on the very day of his approval of that act, nominated John Jay, of New York, as Chief Justice; and John Rutledge, of South Carolina, William

Cushing, of Massachusetts, Robert H. Harrison, of Maryland, James Wilson, of Pennsylvania, and John Blair, of Virginia, as Associate Justices of the Supreme Court; and the nominations were all confirmed by the Senate on the 26th of September. The commissions of Chief Justice Jay and of Mr. Justice Rutledge were dated on that day, and those of the other Justices on successive days, in the order above named, thus determining their precedence. President Washington, in a letter to each of the Associate Justices, informing him of his appointment, remarked, "Considering the judicial system as the chief pillar upon which our National Government must rest;" and in a letter to the Chief Justice, inclosing his commission, said that the judicial department "must be considered as the keystone of our political fabric."

During the first twelve years of the Supreme Court, there were frequent changes in its membership: three by the appointees preferring high offices in the governments of their several States; three others by resignation; one by rejection by the Senate; and two by death.

Rutledge never sat in the Supreme Court as Associate Justice, and in 1791 resigned the office to accept that of Chief Justice of South Carolina. Harrison declined his appointment, preferring to become Chancellor of Maryland. James Iredell, of North Carolina, was appointed in 1790, in the stead of Harrison; and Thomas Johnson, of Maryland, in 1791, in the place of Rutledge. The other Associate Justices before 1801 were two appointed by President Washington: William Paterson, of New Jersey, in 1793, in the place of Thomas Johnson, resigned; and Samuel Chase, of Maryland, in 1796, upon the resignation of Blair; and two appointed by President John Adams: Bushrod Washington, of Virginia, in 1798, upon the death

of Wilson; and Alfred Moore, of North Carolina, in 1799, upon the death of Iredell.

President Washington, in his eight years of office, appointed four Chief Justices of the United States: John Jay in 1789; John Rutledge in 1795; William Cushing and Oliver Ellsworth in 1796. Jay held the office for about five years and nine months; and for the first six months of that time, by the President's request, also acted as Secretary of State. Ellsworth held the office of Chief Justice a little more than four years and a half. But Jay, as well as Ellsworth, during the whole of his last year, ceased to perform his judicial duties, by reason of being employed on a diplomatic mission abroad. Rutledge, after sitting as Chief Justice for a single term, was rejected by the Senate; and Cushing, though confirmed by the Senate, declined the appointment, and remained an Associate Justice until his death in 1810. Ellsworth resigned in 1800, owing to ill health; and Jay resigned in 1795 to accept the office of Governor of the State of New York, and in 1800, towards the close of his second term of office as Governor, being in a depressed condition of health and spirits, and having finally determined to retire from public life, declined a reappointment as Chief Justice, offered him by President Adams on the resignation of Ellsworth.

John Marshall, then Secretary of State, was nominated as Chief Justice of the United States by President Adams on the 20th, confirmed by the Senate on the 27th, and commissioned on the 31st of January, 1801.

His characteristic letter of acceptance, addressed to the President, and dated February 4, 1801, was in these words:

"Sir: I pray you to accept my grateful acknowledg-

ments for the honor conferred on me in appointing me Chief Justice of the United States.

"This additional and flattering mark of your good opinion has made an impression on my mind which time will not efface.

"I shall enter immediately on the duties of the office, and hope never to give you occasion to regret having made this appointment.

"With the most respectful attachment,

"I am, Sir,

"Your obedient servant,

"J. MARSHALL."

On the same day, as is stated on the record of the Supreme Court, his commission as Chief Justice, "bearing date the 31st day of January, A. D. 1801, and of the Independence of the United States the twenty-fifth," was "read in open Court, and the said John Marshall, having taken the oaths prescribed by law, took his seat upon the Bench."

In speaking of one who has been for a hundred years the central and predominant figure in American jurisprudence, little more can be expected, at this day, than to echo what has been better said by others. Almost the whole ground was covered, long ago, by Mr. Binney, in the admirable eulogy delivered before the Councils of the City of Philadelphia on the 24th of September, 1835, the eightieth anniversary of the Chief Justice's birth, and within three months after his death; and by Mr. Justice Story, in the interesting essay, first published in the North American Review in 1828, and again, with some changes, in the American National Portrait Gallery in 1833, and finally developed into his discourse before the Suffolk

Bar on the 15th of October, 1835, and containing much information derived from the Chief Justice himself.

In the researches incited by your invitation, my first and most important discovery was a letter from Chief Justice Marshall, dated "Richmond, March 22d, 1818," and addressed to "Joseph Delaplaine, Esq., Philadelphia." Delaplaine was then publishing, in numbers, his Repository of the Lives and Portraits of Distinguished American Characters, which was discontinued soon afterwards, without ever including Marshall. The letter purports to have been written in answer to one "requesting some account of my birth, parentage, &c.," and contains a short autobiography.

My earliest knowledge of the existence of such an autobiography was obtained from a thin pamphlet, published at Columbus, Ohio, in 1848; found in an old bookstore in Boston; and containing (besides Marshall's famous speech in Congress on the case of Jonathan Robbins) only this letter, entitling it "Autobiography of John Marshall." The internal evidence of its genuineness is very strong; and its authenticity is put almost beyond doubt by a facsimile (recently shown me in your State Library) of a folio sheet in Marshall's handwriting, which, although it contains neither the whole of the letter, nor its address, bears the same date, and does contain the principal paragraph of the letter, word for word, with the corrections of the original manuscript, and immediately followed by his signature.

An autobiography of Marshall is of so much interest that no apology is necessary for quoting it in full. Except for one or two slips of the pen, corrected in the printed pamphlet, it is as follows:

"I was born on the 24th of September, 1755, in the

county of Fauquier in Virginia. My father, Thomas Marshall, was the eldest son of John Marshall, who intermarried with a Miss Markham, and whose parents migrated from Wales, and settled in the county of Westmoreland in Virginia, where my father was born. My mother was named Mary Keith; she was the daughter of a clergyman of the name of Keith who migrated from Scotland, and intermarried with a Miss Randolph on James River. I was educated at home, under the direction of my father, who was a planter, but was often called from home as a surveyor. From my infancy I was destined for the bar; but the contest between the mother country and her colonies drew me from my studies and my father from the superintendence of them; and in September, 1775, I entered into the service as a subaltern. I continued in the army until the year 1781, when, being without a command, I resigned my commission, in the interval between the invasions of Virginia by Arnold and Phillips. In the year 1782, I was elected into the legislature of Virginia; and in the fall session of the same year was chosen a member of the executive council of that State. In January, 1783, I intermarried with Mary Willis Ambler, the second daughter of Mr. Jacquelin Ambler, then treasurer of Virginia, who was the third son of Mr. Richard Ambler, a gentleman who had migrated from England, and settled at Yorktown in Virginia. In April, 1784, I resigned my seat in the executive council, and came to the bar, at which I continued, declining any other public office than a seat in the legislature, until the year 1797, when I was associated with General Pinckney and Mr. Gerry in a mission to France. In 1798, I returned to the United States; and in the spring of 1799 was elected a member of Congress, a can-

didate for which, much against my inclination, I was induced to become by the request of General Washington. At the close of the first session, I was nominated, first to the Department of War, and afterwards to that of State, which last office I accepted, and in which I continued until the beginning of the year 1801, when Mr. Ellsworth having resigned, and Mr. Jay having declined his appointment, I was nominated to the office of Chief Justice, which I still hold.

"I am the oldest of fifteen children, all of whom lived to be married, and of whom nine are now living. My father died when about seventy-four years of age; and my mother, who survived him about seven years, died about the same age. I do not recollect all the societies to which I belong, though they are very numerous. I have written no book, except the *Life of Washington*, which was executed with so much precipitation as to require much correction."

This brief outline of an autobiography, besides its intrinsic value as a whole, is notable in several particulars. It shows that John Marshall was of Welsh, and of Scotch, as well as of English descent; and this through persons who had not recently come over, but had all been in this country long enough to become truly Americans. It attests, over his own hand, that he was educated at home under his father's superintendence and direction, and was destined from infancy for the bar; and also that it was by the request of General Washington, and much against his own inclination, that he was induced to become a candidate for Congress.

Marshall passed his boyhood and early youth in the country, in a healthful climate and beautiful scenery, fond of field sports and athletic exercises, living in a

house containing a good English library, the eldest of a large family of children, under the guidance and in the companionship of a father of strong natural abilities, and to whom, as he used to say, he owed the solid foundation of all his own success in life. As Mr. Binney says: "It is the praise and the evidence of the native powers of his mind, that by domestic instruction, and two years of grammatical and classical tuition obtained from other sources, Mr. Marshall wrought out in after life a comprehensive mass of learning both useful and elegant, which accomplished him for every station that he filled, and he filled the highest of more than one description."

He was licensed to practice law in 1780, and soon became one of the leaders of the bar of Virginia. The Reports of Bushrod Washington and of Daniel Call show that hardly any one argued so many cases before the Court of Appeals of the State.

He was chosen in the spring of 1782 a representative in the legislature of Virginia, and in the fall of the same year a member of the executive council of the State. He also served in the legislature in the years 1784, 1787 to 1792 and 1795.

In the convention of Virginia of 1788 upon the adoption of the Constitution of the United States, Patrick Henry, George Mason and William Grayson were the principal opponents of the Constitution, and James Madison, Governor Randolph, George Nicholas, Edmund Pendleton and John Marshall its leading supporters; and at the close of its proceedings Marshall (then only thirty-three years of age) was made a member, both of the committee to report a form of ratification, and of the committee to report such amendments as by them should be deemed necessary to be recommended; and the only



other persons who were on both committees were Randolph, Nicholas and Madison. Patrick Henry said of him in that convention: "I have the highest veneration and respect for the honorable gentleman; and I have experienced his candour upon all occasions." And ten years after, when Marshall was a candidate for Congress, it being represented that Henry was opposed to him, he wrote and published a letter saying that he should give him his vote for Congress preferably to any citizen of the State, General Washington only excepted.

President Washington offered Marshall the District-Attorneyship for the District of Virginia in 1789, and the Attorney-Generalship, and the mission to France, in 1796. President Adams offered him the office of Associate Justice of the Supreme Court in 1798, upon the death of Mr. Justice Wilson, and before appointing Bushrod Washington.

In 1799 Marshall delivered in the House of Representatives the speech vindicating the right and the duty of the President to surrender Jonathan Robbins to the British Government for trial for a murder on a British ship, of which Mr. Binney justly says that it has all the merits, and nearly all the weight, of a judicial sentence; and Mr. Justice Story, that it placed him at once in the front rank of constitutional statesmen, and settled then, and forever, the points of national law upon which the controversy hinged.

Mr. Wirt, himself eminent as a lawyer and as an orator, who began the practice of the law but ten years later than Marshall, and who knew him well, both at the bar and on the bench, was so impressed with his style of argument, that he returned to it again and again in his let-

ters, which are the more interesting because of the absolute contrast between the two men in that respect.

In the *Letters of a British Spy*, first published in 1803, speaking of Marshall at the bar, Mr. Wirt said: "This extraordinary man, without the aid of fancy, without the advantages of person, voice, attitude, gesture, or any of the ornaments of an orator, deserves to be considered as one of the most eloquent men in the world; if eloquence may be said to consist in the power of seizing the attention with irresistible force, and never permitting it to elude the grasp until the hearer has received the conviction which the speaker intends." "He possesses one original, and almost supernatural, faculty: the faculty of developing a subject by a single glance of his mind, and detecting, at once, the very point on which every controversy depends. No matter what the question; though ten times more knotty than 'the gnarled oak,' the lightning of heaven is not more rapid, nor more resistless, than his astonishing penetration. Nor does the exercise of it seem to cost him an effort. On the contrary, it is as easy as vision. I am persuaded that his eyes do not fly over a landscape, and take in its various objects with more promptitude and facility, than his mind embraces and analyzes the most complex subject. Possessing this intellectual elevation which enables him to look down and comprehend the whole ground at once, he determines immediately, and without difficulty, on which side the question may be most advantageously approached and assailed. In a bad cause, his art consists in laying his premises so remotely from the point directly in debate, or else in terms so general and so specious, that the hearer, seeing no consequence which can be drawn from them, is just as willing to admit them as not; but

his premises once admitted, the demonstration, however distant, follows as certainly, as cogently, as inevitably, as any demonstration in Euclid. All his eloquence consists in the apparently deep self-conviction and emphatic earnestness of his manner; the correspondent simplicity and energy of his style; the close and logical connection of his thoughts; and the easy gradations by which he opens his lights on the attentive minds of his hearers."

Again, in a letter of May 6, 1806, to Benjamin Edwards, a friend of his youth, Mr. Wirt wrote: "Here is John Marshall, whose mind seems to be little else than a mountain of barren stupendous rocks, an inexhaustible quarry from which he draws his materials and builds his fabrics, rude and gothic, but of such strength that neither time nor force can beat them down; a fellow who would not turn off a single step from the right line of his argument, though a paradise should rise to tempt him."

Once more, on December 20, 1833, within two months of his own death, in a letter of advice to a law student, he wrote: "Learn (I repeat it) *to think — to think deeply, comprehensively, powerfully* — and learn the simple, nervous language which is appropriate to that kind of thinking. Read the legal and political arguments of Chief Justice Marshall, and those of Alexander Hamilton, which are coming out. Read them, *study them*; and observe with what an omnipotent sweep of thought they range over the whole field of every subject they take in hand — and that with a scythe so ample and so keen, that not a straw is left standing behind them."

Before Marshall became Chief Justice, very few cases of constitutional law were decided by the Supreme Court.

The most important one was the case of *Chisholm*

against the State of Georgia, in which it was held in 1793, by Chief Justice Jay and his associates, Mr. Justice Iredell dissenting, that the Supreme Court had original jurisdiction of an action brought against a State by a citizen of another State. That decision proceeded upon the ground that such was the effect of the Constitution, established by the people in their sovereign capacity. But it was inconsistent with the view which had been maintained by Marshall in the Virginia convention of 1788; and it was presently, as the Supreme Court has since said, reversed and overruled by the people themselves, in the Eleventh Amendment of the Constitution, which declared that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

Two cases from the Virginia Circuit were argued at Philadelphia, in February, 1796, before Justices Cushing, Wilson, Paterson and Chase, just before the appointment of Chief Justice Ellsworth. In one of them, *Ware against Hylton*, the case of the British debts, Marshall was of counsel against the debts, and the court held them to be protected by the treaty of peace. In the other, *Hylton against the United States*, in which the court upheld the constitutionality of the carriage tax, Marshall is said by Judge Tucker to have been of counsel against the tax in the Circuit Court; and Mr. Wirt, in a letter to Francis W. Gilmer of November 2, 1818, more than twenty years after, spoke of Marshall as having argued this case in Philadelphia; but Mr. Wirt probably had in mind the case of the British debts.

John Marshall was Chief Justice of the United States

for more than thirty-four years, from his taking the oath of office on February 4, 1801, to his death on July 6, 1835.

After his accession, the changes in the membership of the Supreme Court became much less frequent than they had been during the earlier years of the court. Of the Associate Justices on the bench at the time of his appointment, Moore continued to serve for three years; Paterson for nearly five years; Cushing and Chase for nearly eleven years; and Bushrod Washington for nearly twenty-nine years. William Johnson, appointed on the resignation of Moore in 1804, served thirty years, dying within a year before Chief Justice Marshall; Livingston, appointed on the death of Paterson in 1806, served sixteen years; Todd, appointed in 1807 (under an act of Congress increasing the number of Associate Justices to six), nineteen years; and Duvall, appointed in 1811, on the death of Chase, twenty-three years, resigning in January, 1835. Story, also appointed in 1811, on the death of Cushing, served nearly thirty-four years; and Thompson, appointed in 1823, on the death of Livingston, twenty years. Trimble, appointed in 1826, on the death of Todd, died in little more than two years; and McLean, appointed in his place in 1829, served thirty-two years. Justices Story, Thompson and McLean remained on the bench at the time of Chief Justice Marshall's death. The other Associate Justices at that time were Baldwin, appointed in 1830, on the death of Bushrod Washington; and Wayne, appointed January 5, 1835, in the place of William Johnson.

Chief Justice Marshall's conduct in regard to the appointment of some of his associates is worthy of mention.

On the death of Mr. Justice Trimble in 1828, President John Quincy Adams offered his place to Henry Clay, who

declined it, and (as Mr. Adams states in his diary) “read me a letter from Chief Justice Marshall, speaking very favorably of J. J. Crittenden to fill the office of Judge of the Supreme Court, but declining to write to me.” Crittenden was nominated by President Adams, but was not confirmed by the Senate.

In January, 1835, upon the resignation of Mr. Justice Duvall, President Jackson nominated Roger B. Taney as Associate Justice in his place. While the nomination was pending before the Senate, Chief Justice Marshall wrote a note to Mr. Leigh, then a Senator from Virginia, in these terms: “If you have not made up your mind on the nomination of Mr. Taney, I have received some information in his favor which I would wish to communicate.” Taney’s nomination as Associate Justice was indefinitely postponed by the Senate; but within a year afterwards, upon the death of Chief Justice Marshall, he was nominated and confirmed as Chief Justice of the United States.

Before Marshall’s appointment, the practice appears to have been for all the justices to deliver their opinions *seriatim* — a practice which tends to bring into prominence the subordinate points of view in which they differ, and to obscure the principal point on which they agree; and, while it sometimes makes the report of the case more interesting, tends to impair its weight as a precedent for the determination of future controversies. Under Marshall, all subordinate differences seem to have been settled in conference, or at any rate less often displayed to the public; and the opinion of the court was usually delivered by one justice, and in the majority of important, and especially of constitutional cases, by Marshall himself. During his time there were few dissenting opinions.

The only constitutional case in which Chief Justice Marshall dissented from the judgment of the court was *Ogden against Saunders* in 1827, which was decided by a bare majority of the court against the opinion of Marshall, Duvall and Story. But in *Boyle against Zacharie* in 1832, notwithstanding a change in the membership of the court, Marshall declared that the principles established in the former opinion were to be considered no longer open for controversy.

Chief Justice Marshall, as appears by letters from him to his associates on April 18, 1802, was originally of opinion that the Justices of the Supreme Court could not hold Circuit Courts without distinct commissions as circuit judges. But in *Stuart against Laird* in 1803, apparently deferring to the opinions of his associates, he acted as circuit judge; and the Supreme Court, in an opinion delivered by Mr. Justice Paterson, affirmed his judgment, upon the ground that practice and acquiescence for several years, commencing with the organization of the judicial system, had fixed the construction beyond dispute.

Marshall's judicial demeanor is best stated in the words of an eye-witness. Mr. Binney, who had been admitted to the bar of the Supreme Court in 1809, and who had often practiced before him, tells us:

"He was endued by nature with a patience that was never surpassed — patience to hear that which he knew already, that which he disapproved, that which questioned himself. When he ceased to hear, it was not because his patience was exhausted, but because it ceased to be a virtue.

"His carriage in the discharge of his judicial business was faultless. Whether the argument was animated or

dull, instructive or superficial, the regard of his expressive eye was an assurance that nothing that ought to affect the cause was lost by inattention or indifference; and the courtesy of his general manner was only so far restrained on the bench as was necessary for the dignity of office, and for the suppression of familiarity.

“His industry and powers of labour, when contemplated in connection with his social temper, show a facility that does not generally belong to parts of such strength.”

“To qualities such as these, he joined an immovable firmness befitting the office of presiding judge in the highest tribunal of the country. It was not the result of excited feeling, and consequently never rose or fell with the emotions of the day. It was the constitution of his nature, and sprung from the composure of a mind undisturbed by doubt, and of a heart unsusceptible of fear.”

“In him his country has seen that triple union of lawyer, statesman, and patriot, which completes the frame of a great constitutional judge.”

He had not the technical learning in the common law of Coke, or of several of Coke's successors. But, in the felicitous words of Mr. Justice Story, “he seized, as it were by intuition, the very spirit of juridical doctrines, though cased up in the armor of centuries; and he discussed authorities as if the very minds of the judges themselves stood disembodied before him.”

He had not the learning of Nottingham or of Hardwicke in the jurisdiction and practice of the court of chancery, or of Mansfield in the general maritime law. But his judgments show that he was a master of the principles of equity and of commercial law.

He had not the elegant scholarship of Stowell. But it



is not too much to say that his judgments in prize causes exhibit a broader and more truly international view of the law of prize. Upon the question of the exemption of ships of war and some other ships, it was observed by Lord Justice Brett in the English Court of Appeal in 1880, "the first case to be carefully considered is, and always will be, *The Exchange*," decided by Chief Justice Marshall in 1812.

The jurisdiction of the court over which he presided was not confined to one department or branch of the law; it included common law, equity, maritime law, the law of admiralty and prize, and, in some degree, the civil law of Spain and of France.

Beyond all this, the jurisdiction of his court extended to constitutional law, in a more comprehensive sense than ever belonged to the courts of any other country.

In England, there is no law of higher sanction than an act of Parliament; and Parliament has uncontrolled power to change or to repeal even *Magna Charta*. It is otherwise in this country.

One of the earliest and most important judgments of Marshall is *Marbury against Madison*, decided in 1803, in which the paramount obligation of the Constitution over all ordinary statutes was declared and established by a course of reasoning which may be indicated by a few extracts from the opinion:

"The Constitution is either a superior paramount law, unchangeable by ordinary means; or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on

the part of the people, to limit a power in its own nature illimitable.

“Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of the fundamental principles of our society.”

“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law disregarding the Constitution; or conformably to the Constitution disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.”

“The particular phraseology of the Constitution of the United States confirms and strengthens the principle supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument.”

In the light of experience, it is curious to look back upon

the doubt and apprehension entertained by some of the Northern Federalists with regard to Marshall shortly before he became Chief Justice. For instance, on the 29th of December, 1799, when he had just entered the House of Representatives, Oliver Wolcott, then Secretary of the Treasury under President Adams, wrote to Fisher Ames: "He is doubtless a man of virtue and distinguished talents; but he will think much of the State of Virginia, and is too much disposed to govern the world according to rules of logic; he will read and expound the Constitution as if it were a penal statute, and will sometimes be embarrassed with doubts of which his friends will not perceive the importance."

Why should he not "think much of the State of Virginia?" What State of the Union had produced such a galaxy of great men? And what American, worthy of the name, does not cherish a peculiar affection for the State of his birth and his home? But such an affection for one's own State is by no means incompatible with a paramount allegiance and devotion to the United States as one's country. There is no more striking illustration of this truth than Chief Justice Marshall himself.

It was upon writs of error to the highest court of Virginia in which a decision in the case could be had—at first in 1816, in the case of *Martin against Hunter's Lessee*, a case between private individuals; and afterwards in 1821, in the case of *Cohens against Virginia*, a criminal prosecution instituted by the State—that the Supreme Court, under the lead of Chief Justice Marshall, upheld and established its appellate jurisdiction, under the Constitution and the Judiciary Act, to review the judgment of the State court against a right claimed under the Constitution or the laws of the United States. In the first

case, indeed, perhaps because it came from his own State, he allowed Mr. Justice Story to draw up the opinion of the court. But in the second case he himself expressed the unanimous conclusion of the court in one of his most elaborate and most powerful judgments.

The idea that he would "read and expound the Constitution as if it were a penal statute" seems now almost ludicrous. Take, for instance, his judgments in the cases of *McCulloch* against Maryland in 1819, and of *Wiltberger* in 1820. In *Wiltberger's* case, he clearly stated the reasons and the limits of the rule that penal statutes are to be construed strictly. But in *McCulloch's* case, when dealing with the question what powers may be implied from the express grants to Congress in the Constitution, he said: "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could hardly be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the first article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is *a constitution* we are expounding."

In *McCulloch's* case, after full discussion, he thus defined the rule: "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." "Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power."

Among his other greatest judgments are *United States against Peters*, on the sanctity of judgments of the courts of the United States; *Fletcher against Peck*, and *Dartmouth College against Woodward*, that a grant by a State is a contract, the obligation of which cannot afterwards be impaired; *Gibbons against Ogden*, and *Brown against Maryland*, on the paramount nature of the power of Congress to regulate commerce with foreign nations and among the several States; *Sturges against Crowninshield*, on the power of the States to pass insolvent laws; and *Osborn against the Bank of the United States*, on the subject of suits by the Bank of the United States.

But he gave due weight to the decisions of the courts

of the several States, saying, in *Elmendorf* against *Taylor*: "This court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the courts of the State have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the courts of the several States to the legislative acts of those States is received as true, unless they come in conflict with the Constitution, laws or treaties of the United States."

In the cases of *Bollman* and *Swartwout* in the Supreme Court, and in the trial of *Aaron Burr* in this Circuit, he set bounds to the doctrine of constructive treasons. As showing the pains taken by the Chief Justice, it may be interesting to note, what is not generally known, that on June 29, 1807, after the indictments had been found against *Burr* and others, and more than a month before the trial, he wrote letters to each of his associates, asking

their opinions upon questions of law that would arise, and saying: "I am aware of the unwillingness with which a judge will commit himself by an opinion on a case not before him, and on which he has heard no argument. Could this case be readily carried into the Supreme Court, I would not ask an opinion in its present stage. But these questions must be decided by the judges separately on their respective circuits, and I am sure there would be a strong and general repugnance to giving contradictory decisions on the same points. Such a circumstance would be disreputable to the judges themselves, as well as to our judicial system. This consideration suggests the propriety of a consultation on new and difficult subjects, and will, I trust, apologize for this letter."

His letters to Mr. Justice Story show that he often consulted him on admiralty cases pending in the Circuit Court.

One is apt to forget that Mr. Justice Story was originally a Democrat, and was appointed to the court by James Madison, a Democratic President. He soon became a devoted adherent of Chief Justice Marshall, and fully recognized his leadership.

In an article in the *North American Review* in 1828 he wrote: "We resume the subject of the constitutional labors of Chief Justice Marshall. We emphatically say, of Chief Justice Marshall; for though we would not be unjust to those learned gentlemen who have from time to time been his associates on the bench, we are quite sure that they would be ready to admit, what the public universally believe, that his master mind has presided in their deliberations, and given to the results a cogency of reasoning, a depth of remark, a persuasiveness of argument, a clearness and elaboration of illustration, and an

elevation and comprehensiveness of conclusion, to which none others offer a parallel. Few decisions upon constitutional questions have been made, in which he has not delivered the opinion of the court; and in these few, the duty devolved upon others to their own regret, either because he did not sit in the cause, or from motives of delicacy abstained from taking an active part."

Five years later, in dedicating his Commentaries on the Constitution of the United States to Chief Justice Marshall, Mr. Justice Story said: "When I look back upon your judicial labors during a period of thirty-two years, it is difficult to suppress astonishment at their extent and variety, and at the exact learning, the profound reasoning and the solid principles which they everywhere display. Other judges have attained an elevated reputation by similar labors in a single department of jurisprudence. But in one department (it need scarcely be said that I allude to that of constitutional law), the common consent of your countrymen has admitted you to stand without a rival. Posterity will assuredly confirm, by its deliberate award, what the present age has approved as an act of undisputed justice."

Upon two important points in which decisions made in Chief Justice Marshall's time have been since overruled, the later decisions are in accord with the opinions which he finally entertained.

The court, in 1809, in opinions delivered by him, decided that a corporation aggregate could not be a citizen; and could not litigate in the courts of the United States, unless in consequence of the character of its members, appearing by proper averments upon the record. In *Louisville Railroad Company against Letson*, in 1844, those decisions were overruled; and it appears by the



opinion of the court, as well as by a letter from Mr. Justice Story to Chancellor Kent of August 31, 1844, that Chief Justice Marshall had become satisfied that the early decisions were wrong.

In the case of *The Thomas Jefferson*, in 1825, it was decided by a unanimous opinion of the court, delivered by Mr. Justice Story, that the jurisdiction of the courts of admiralty of the United States was limited by the ebb and flow of the tide. But an article published in the *New York Review* for October, 1838, by one who was evidently intimate with Chief Justice Marshall, tells us: "He said (and he spoke of it as one of the most deliberate opinions of his life), at a comparatively late period, that he had always been of opinion that we in America had misapplied the principle upon which the admiralty jurisdiction depended — that in England the common expression was, that the admiralty jurisdiction extended only on tide waters, and as far as the tide ebbed and flowed; and this was a natural and reasonable exposition of the jurisdiction in England, where the rivers were very short, and none of them navigable from the sea beyond the ebb and flow of the tide — that such a narrow interpretation was wholly inapplicable to the great rivers of America; that the true principle, upon which the admiralty jurisdiction in America depended, was to ascertain how far the river was navigable from the sea; and that consequently, in America, the admiralty jurisdiction extended upon our great rivers not only as far as the tide ebbed and flowed in them, but as far as they were navigable from the sea; as, for example, on the Mississippi and its branches, up to the falls of the Ohio. He also thought that our great lakes at the west were not to be considered as mere inland lakes, but were to be deemed inland

navigable seas, and as such were subject, or ought to be subject, to the same jurisdiction." He thus foreshadowed the decision made in 1851 in the case of *The Genesee Chief*, by which the decision in *The Thomas Jefferson* was explicitly overruled.

Among the most interesting records of the impression made by Chief Justice Marshall upon his contemporaries are entries written presently after his death (although not published until much later) in the diary of John Quincy Adams, who was then sixty-eight years old; had been a member of either House of Congress; charged with many a diplomatic mission abroad; Secretary of State throughout the administration of President Monroe, and himself President of the United States; had long before been an active member of the bar of the Supreme Court, and had declined the appointment of Associate Justice, offered him by President Madison before he appointed Mr. Justice Story; and who, as his diary shows, was not given to indiscriminate or excessive laudation.

In that diary, under date of July 10, 1835, Mr. Adams wrote: "John Marshall, Chief Justice of the United States, died at Philadelphia last Monday, the 6th instant. He was one of the most eminent men that this country has ever produced. He has held this appointment thirty-five years. It was the last act of my father's administration, and one of the most important services rendered by him to his country. All constitutional governments are flexible things; and as the Supreme Judicial Court is the tribunal of last resort for the construction of the Constitution and the laws, the office of Chief Justice of that court is a station of the highest trust, of the deepest responsibility, and of influence far more extensive than that of the President of the United States. John Mar-

shall was a Federalist of the Washington school. The Associate Judges from the time of his appointment have generally been taken from the Democratic or Jeffersonian party." "Marshall, by the ascendancy of his genius, by the amenity of his deportment, and by the imperturbable command of his temper, has given a permanent and systematic character to the decisions of the court, and settled many great constitutional questions favorably to the continuance of the Union."

In the same diary, again, a month later, Mr. Adams wrote: "The office of Chief Justice requires a mind of energy sufficient to influence generally the minds of a majority of his associates; to accommodate his judgment to theirs, or theirs to his own; a judgment also capable of abiding the test of time and of giving satisfaction to the public. It requires a man profoundly learned in the law of nations, in the commercial and maritime law, in the civil law, in the common law of England, and in the general statute laws of the several States of the Union. With all these powers steadily exercised during a period of thirty-four years, Chief Justice Marshall has settled many questions of constitutional law, certainly more than all the Presidents of the United States together."

The late Mr. Justice Bradley, after a distinguished service of nearly twenty years on the bench of the Supreme Court, wrote in 1889 of Chief Justice Marshall as follows: "It is needless to say that Marshall's reputation as a great constitutional judge is peerless. The character of his mind and his previous training were such as to enable him to handle the momentous questions to which the conflicting views upon the Constitution gave rise, with the soundest logic, the greatest breadth of view, and the most far-seeing statesmanship. He came to the bench with a

reputation already established — the reputation not only of a great lawyer, but of an eminent statesman and publicist." "It may truly be said that the Constitution received its final and permanent form from the judgments rendered by the Supreme Court during the period in which Marshall was at its head. With a few modifications, superinduced by the somewhat differing views on two or three points of his great successor, and aside from the new questions growing out of the late civil war and the recent constitutional amendments, the decisions made since Marshall's time have been little more than the application of the principles established by him and his venerated associates."

"The American Constitution as it now stands," says Mr. James Bryce, in his book on *The American Commonwealth*, "is a far more complete and finished instrument than it was when it came fire-new from the hands of the Convention. It is not merely their work, but the work of the judges, and most of all of one man, the great Chief Justice Marshall." "His work of building up and working out the Constitution was accomplished not so much by the decisions he gave, as by the judgments in which he expounded the principles of these decisions, judgments which for their philosophical breadth, the luminous exactness of their reasoning, and the fine political sense which pervades them, have never been surpassed and rarely equaled by the most famous jurists of modern Europe or of ancient Rome." "He grasped with extraordinary force and clearness the cardinal idea that the creation of a national government implies the grant of all such subsidiary powers as are requisite to the effectuation of its main powers and purposes; but he developed and applied this idea with so much prudence and sobriety, never

treading ~~on~~ purely political ground, never indulging the temptation to theorize, but content to follow out as a lawyer the consequences of legal principles, that the Constitution seemed not ~~so much~~ to rise under his hands to its full stature, as to be gradually unveiled by him till it stood revealed in the harmonious perfection of the form which its framers had designed."

The very greatness and completeness of the work of Chief Justice Marshall tends to prevent our appreciating how great it was.

He was a great statesman, as well as a great lawyer, and yet constantly observed the distinction between law, as judicially administered, and statesmanship.

The Constitution of the United States created a nation upon the foundation of a written constitution; and, as expounded by Marshall, transferred in large degree the determination of the constitutionality of the acts of the legislature or the executive from the political to the judicial department.

Marshall grew up with the Constitution. He served in the legislature of Virginia before and after its adoption, and in the convention of Virginia by which it was ratified. He took part in its administration, abroad and at home, in a foreign mission, in the House of Representatives, and in the Department of State, before he became the head of the judiciary, within a quarter of a century after the Declaration of Independence, and less than twelve years after the Constitution was established.

During the thirty-four years of his Chief Justiceship he expounded and applied the Constitution, in almost every aspect, with unexampled sagacity, courage and caution.

He had an intuitive perception of the real issue of

every case, however complicated, and of the way in which it should be decided.

His manner of reasoning was peculiarly judicial. It was simple, direct, clear, strong, earnest, logical, comprehensive, demonstrative, starting from admitted premises, frankly meeting every difficulty, presenting the case in every possible aspect, and leading to philosophical and profoundly wise conclusions, sound in theory and practical in result. He recognized that, next to a right decision, it was important that reasons for the decision should be fully stated so as to satisfy the parties and the public. And it may be said of him, as Charles Butler, in his *Reminiscences*, says of Lord Camden, that he sometimes "rose to sublime strains of eloquence: but their sublimity was altogether in the sentiment; the diction retained its simplicity, and this increased the effect."

It was in the comparatively untrodden domain of constitutional law, in bringing acts of the legislature and of the executive to the test of the fundamental law of the Constitution, that his judicial capacity was preëminently shown. Deciding upon legal grounds, and only so much as was necessary for the disposition of the particular case, he constantly kept in mind the whole scheme of the Constitution. And he answered all possible objections with such fullness and such power as to make his conclusions appear natural and inevitable.

✧ The principles affirmed by his judgments have become axioms of constitutional law. ✧ And it is difficult to overestimate the effect which those judgments have had in quieting controversies on constitutional questions, and in creating or confirming a sentiment of allegiance to the Constitution, as loyal and devoted as ever was given to any sovereign.

You will, I hope, forgive me one personal anecdote. While I had the honor to be Chief Justice of Massachusetts, I was a guest of a Boston merchant at a dinner party of gentlemen, which included Mr. Bartlett, then the foremost lawyer of Massachusetts, and one of the leaders at the bar of the Supreme Court of the United States. In the course of the dinner, the host, turning to me, asked, "How great a judge was this Judge Marshall, of whom you lawyers are always talking?" I answered, "The greatest judge in the language." Mr. Bartlett spoke up, "Is not that rather strong, Chief Justice?" I rejoined, "Mr. Bartlett, what do you say?" After a moment's pause, and speaking with characteristic deliberation and emphasis, he replied: "I do not know but you are right."

A service of nearly twenty years on the bench of the Supreme Court has confirmed me in this estimate. We must remember that, as has been well said by an eminent advocate of our own time, Mr. Edward J. Phelps, in speaking of Chief Justice Marshall: "The test of historical greatness — the sort of greatness that becomes important in future history — is not great ability merely. It is great ability, combined with great opportunity, greatly employed." None other of the great judges of England or of America ever had the great opportunity that fell to the lot of Marshall.

John Marshall, during his term of office as Chief Justice, undertook no other public employment, except that, at the beginning of that term, and at the particular request of President John Adams, he continued to hold the office of Secretary of State for the last month of his administration; and that at seventy-four years of age, and after having been Chief Justice twenty-eight years, he was per-

suaded to serve as a member of the Virginia convention of 1829-30 to revise the constitution of the State.

At the time of becoming a member of that convention, he wrote to Mr. Justice Story an amusingly apologetic letter, dated Richmond, June 11, 1829, in which he said: "I am almost ashamed of my weakness and irresolution, when I tell you that I am a member of our convention. I was in earnest when I told you that I would not come into that body, and really believed that I should adhere to that determination; but I have acted like a girl addressed by a gentleman she does not positively dislike, but is unwilling to marry. She is sure to yield to the advice and persuasion of her friends." "I assure you I regret being a member, and could I have obeyed the dictates of my own judgment I should not have been one. I am conscious that I cannot perform a part I should wish to take in a popular assembly; but I am like Molière's *Médecin Malgré Lui*."

Mr. Grigsby tells us that "he spoke but seldom in the convention, and always with deliberation," and that "an intense earnestness was the leading trait of his manner." Some remarks of his on the judicial tenure may fitly be quoted, without comment.

Strenuously upholding, as essential to the independence of the judiciary, the tenure of office during good behavior, he said: "I have grown old in the opinion that there is nothing more dear to Virginia, or ought to be dearer to her statesmen, and that the best interests of our country are secured by it. Advert, Sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting: between the most powerful individual in the community and the



poorest and most unpopular." "Is it not, to the last degree, important that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? You do not allow a man to perform the duties of a juryman or a judge if he has one dollar of interest in the matter to be decided; and will you allow a judge to give a decision when his office may depend upon it? When his decision may offend a powerful and influential man?" "And will you make me believe that if the manner of his decision may affect the tenure of that office, the man himself will not be affected by that consideration?" "I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent judiciary."

The question of the weight, as a precedent, of the act of Congress of 1802, abolishing the circuit judgeships created by Congress in 1801, having been discussed by other members of the convention, and Chief Justice Marshall's opinion having been requested, he said, "that it was with great, very great repugnance, that he rose to utter a syllable upon the subject. His reluctance to do so was very great indeed; and he had, throughout the previous debates on this subject, most carefully avoided expressing any opinion whatever upon what had been called a construction of the Constitution of the United States by the act of Congress of 1802. He should now, as far as possible, continue to avoid expressing any opinion on that act of Congress. There was something in his situation which ought to induce him to avoid doing so. He would go no farther than to say that he did not conceive the Constitution to have been at all definitively expounded by a

single act of Congress. He should not meddle with the question whether a course of successive legislation should or should not be held as a final exposition of it; but he would say this: that a single act of Congress, unconnected with any other act by the other departments of the Federal Government, and especially of that department more especially intrusted with the construction of the Constitution in a great degree, when there was no union of departments, but the legislative department alone had acted, and acted but once, even admitting that act not to have passed in times of high political and party excitement, could never be admitted as final and conclusive."

A discussion of the merits of his Life of Washington would be out of place on this occasion. But I may mention having been favored with a sight of his letter of November 25, 1833, accepting the Presidency of the Washington National Monument Society, in which he said: "You are right in supposing that the most ardent wish of my heart is to see some lasting testimonial of the grateful affection of his country erected to the memory of her first citizen. I have always wished it, and have always thought that the metropolis of the Union was the first place for this national monument."

His letter to Delaplaine, containing the autobiography already quoted, contains another passage too characteristic to be omitted: "I received also a letter from you, requesting some expression of my sentiments respecting your repository, and indicating an intention to publish in some conspicuous manner the certificates which might be given by Mr. Wirt and myself. I have been ever particularly unwilling to obtain this kind of distinction, and must insist on not receiving it now. I have, however, no difficulty in saying, that your work is one in which the

nation ought to feel an interest, and I sincerely wish it may be encouraged, and that you may receive ample compensation for your labor and expense. The execution is, I think, in many respects praiseworthy. The portraits, an object of considerable interest, are, so far as my acquaintance extends, good likenesses; and the printing is neatly executed with an excellent type. In the characters there is of course some variety. Some of them are drawn with great spirit and justice; some are, perhaps, rather exaggerated. There is much difficulty in giving living characters, at any rate until they shall have withdrawn from the public view." And Mr. Wirt, then Attorney-General, wrote a similar letter November 5, 1818, to Delaplaine.

Marshall was, like Lord Camden and other eminent judges, a great reader of novels. On November 26, 1826, he wrote to Mr. Justice Story that he had just finished reading Miss Austen's novels, and was much pleased with them, saying: "Her flights are not lofty, she does not soar on eagle's wings, but she is pleasing, interesting, equable and yet amusing."

To his latest years he retained his love of country life, and his habits of exercise in the open air. He continued to own the family place in Fauquier county, where he had passed his boyhood, and usually visited it in the summer. And he had another farm three or four miles from Richmond, and often walked out or in.

Mr. Binney, in his sketches of the Old Bar of Philadelphia, incidentally mentions: "After doing my best, one morning, to overtake Chief Justice Marshall in his quick march to the Capitol, when he was nearer to eighty than to seventy, I asked him to what cause in particular he attributed that strong and quick step; and he replied

that he thought it was most due to his commission in the army of the Revolution, in which he had been a regular foot practitioner for nearly six years."

You would not forgive me, were I to omit to mention the Quoit Club, or Barbecue Club, which for many years used to meet on Saturdays at Buchanan's Spring in a grove on the outskirts of Richmond. The city has spread over the place of meeting, the spring has been walled in and the grove cut down, and the memories of the Club are passing into legend.

According to an account preserved in an article on Chief Justice Marshall in the number for February, 1836, of the Southern Literary Messenger (which I believe has always been considered as faithfully recording the sentiments and the traditions of Virginia), the Quoit Club was coëval with the Constitution of the United States, having been organized in 1788 by thirty gentlemen, of whom Marshall was one; and it grew out of informal fortnightly meetings of some Scotch merchants to play at quoits. Who can doubt that, if those Scotchmen had only introduced their national game of golf, the Chief Justice would have become a master of that game?

There are several picturesque descriptions of the part he took at the meetings of the Quoit Club. It is enough to quote one, perhaps less known than the others, in which the artist, Chester Harding, visiting Richmond during the session of the State convention of 1829-30, when the Chief Justice was nearly seventy-five years old, and the last survivor of the founders of the club, tells us: "I again met Judge Marshall in Richmond, whither I went during the sitting of the convention for amending the constitution. He was a leading member of a quoit club, which I was invited to attend. The bat-

tle-ground was about a mile from the city, in a beautiful grove. I went early, with a friend, just as the party were beginning to arrive. I watched for the coming of the old chief. He soon approached with his coat on his arm, and his hat in his hand, which he was using as a fan. He walked directly up to a large bowl of mint-julep, which had been prepared, and drank off a tumbler full of the liquid, smacked his lips, and then turned to the company with a cheerful 'How are you, gentlemen?' He was looked upon as the best pitcher of the party, and could throw heavier quoits than any other member of the club. The game began with great animation. There were several ties; and, before long, I saw the great Chief Justice of the Supreme Court of the United States down on his knees, measuring the contested distance with a straw, with as much earnestness as if it had been a point of law; and if he proved to be in the right, the woods would ring with his triumphant shout."

In the summer and autumn of 1831, the Chief Justice had a severe attack of stone, which was cured by lithotomy, performed by the eminent surgeon, Dr. Physick, of Philadelphia, in October, 1831. Another surgeon, who assisted at the operation, tells us that his recovery was in a great degree owing to his extraordinary self-possession, and to the calm and philosophical views which he took of his case, and of the various circumstances attending it. Just before the operation, he wrote to Mr. Justice Story: "I am most earnestly attached to the character of the department, and to the wishes and convenience of those with whom it has been my pride and my happiness to be associated for so many years. I cannot be insensible to the gloom which lowers over us. I have a repugnance to abandoning you under such circumstances,

which is almost invincible. But the solemn convictions of my judgment, sustained by some pride of character, admonish me not to hazard the disgrace of continuing in office a mere inefficient pageant." He concluded by saying that he had determined to postpone until the next term the question whether he should resign his office. After the operation, he wrote: "Thank Heaven, I have reason to hope that I am relieved. I am, however, under the very disagreeable necessity of taking medicine continually to prevent new formations. I must submit, too, to a severe and most unsociable regimen. Such are the privations of age." He continued to perform the duties of his office, with undiminished powers of mind, for nearly four years more, and ultimately died, in his eightieth year, of a disease of a wholly different character, an enlarged condition of the liver.

There are many testimonies to his great modesty, self-effacement and true humility, in any company, whether of friends or of strangers. Let me quote but one, recently made known to me by the kindness of the President of your Supreme Court of Appeals (a kinsman of Chief Justice Marshall), and which, with his permission, is given in his own words: "I have an aunt in Fauquier county, Miss Lucy Chilton, now in her ninety-first year. I asked her on one occasion if she had known Judge Marshall. She replied that she had spent weeks at a time in the same house with him. I then asked her what trait or characteristic most impressed her. She replied without hesitation: 'His humility. He seemed to think himself the least considered person in whatever company he chanced to be.'" This quality in him may help us to understand the saying, that the great lawgiver and judge of the Hebrews—who, we are told, "was

learned in all the wisdom of the Egyptians, and was mighty in words and in deeds"—was "very meek, above all men which were upon the face of the earth."

Chief Justice Marshall was a steadfast believer in the truth of Christianity as revealed in the Bible. He was brought up in the Episcopal Church; and Bishop Meade, who knew him well, tells us that he was a constant and reverent worshipper in that church, and contributed liberally to its support, although he never became a communicant. All else that we know of his personal religion is derived from the statements (as handed down by the good bishop) of a daughter of the Chief Justice, who was much with him during the last months of his life. She said that her father told her he never went to bed without concluding his prayer by repeating the Lord's Prayer and the verse beginning, "Now I lay me down to sleep," which his mother had taught him when he was a child; and that the reason why he had never been a communicant was that it was but recently that he had become fully convinced of the divinity of Christ, and he then "determined to apply for admission to the communion of our church—objected to commune in private, because he thought it his duty to make a public confession of the Saviour—and, while waiting for improved health to enable him to go to the church for that purpose, he grew worse and died, without ever communing."

His private character cannot be more felicitously or more feelingly summed up than in the resolutions drawn up by Mr. Leigh, and unanimously adopted by the Bar of this Circuit, soon after the death of the Chief Justice: "His private life was worthy of the exalted character he sustained in public station. The unaffected simplicity of his manners; the spotless purity of his morals; his social,

gentle, cheerful disposition; his habitual self-denial, and boundless generosity towards others; the strength and constancy of his attachments; his kindness to his friends and neighbors; his exemplary conduct in the relations of son, brother, husband, father; his numerous charities; his benevolence towards all men, and his ever active beneficence,—these amiable qualities shone so conspicuously in him, throughout his life, that, highly as he was respected, he had the rare happiness to be yet more beloved."

Let me add a few words from the address of Mr. William Maxwell before the Virginia Historical and Philosophical Society on March 2, 1836, preserved in the *Southern Literary Messenger*: "He came about amongst us, like a father amongst his children, like a patriarch amongst his people — like that patriarch whom the sacred Scriptures have canonized for our admiration — 'when the eye saw him it blessed him; when the ear heard him it gave witness to him; and after his words men spake not again.'"

The earliest and most lifelike description that we have of his face and figure is one given by the kinsman who was present on the occasion, already mentioned, of his taking command of a militia company in 1775, when not quite twenty years of age: "He was about six feet high, straight and rather slender; of dark complexion, showing little if any rosy red, yet good health; the outline of the face nearly a circle, and, within that, eyes dark to blackness, strong and penetrating, beaming with intelligence and good nature; an upright forehead, rather low, was terminated in a horizontal line by a mass of raven-black hair of unusual thickness and strength; the features of the face were in harmony with this outline, and the temples fully developed; the result of this combination was



interesting and very agreeable. The body and limbs indicated agility rather than strength, in which, however, he was by no means deficient." A few words more may be quoted, completing the picture: "He wore a purple or pale-blue hunting-shirt, and trousers of the same material fringed with white. A round black hat, mounted with the bucks-tail for a cockade, crowned the figure and the man."

"This is a portrait to which," adds Mr. Binney, "in everything but the symbols of the youthful soldier, and one or two of those lineaments which the hand of time, however gentle, changes and perhaps improves, he never lost his resemblance. All who knew him well will recognize its truth to nature."

Of all the portraits by various artists, that which best accords with the above description, especially in the "eyes dark to blackness, strong and penetrating, beaming with intelligence and good nature," is one by Jarvis (perhaps the best American portrait painter of his time, next to Stuart), which I have had the good fortune to own for thirty years, and of which, before I bought it, Mr. Middleton, then the clerk of the Supreme Court, who had been deputy clerk for eight years under Chief Justice Marshall, wrote me: "It is an admirable likeness; better than the one I have, which has always been considered one of the best." This portrait was taken while his hair was still black, or nearly so; and, as shown by the judicial robe, and by the curtain behind and above the head, was intended to represent him as he sat in court.

The most important of the later portraits are those painted by Harding in 1828-30, and by Inman in 1831, with a graver expression of countenance, with the hair quite gray, and with deep lines in the face.

Harding's portraits were evidently thought well of, by the subject, as well as by the artist. One of them, afterwards bequeathed by Mr. Justice Story to Harvard College, was sent to him by the Chief Justice in March, 1828, with a letter saying, "I beg you to accept my portrait, for which I sat in Washington to Mr. Harding, to be preserved when I shall sleep with my fathers, as a testimonial of sincere and affectionate friendship;" and in the same letter he gave directions for paying Harding "for the head and shoulders I have bespoke for myself." Harding's principal portrait of Marshall was painted in 1830 for the Boston Athenæum, in whose possession it still is; it has the advantage of being a full length, showing that in his seventy-fifth year he retained the erect and slender figure of his youth; and the artist wrote of it in his autobiography: "I consider it a good picture. I had great pleasure in painting *the whole* of such a man."

Inman's careful portrait, in the possession of the Philadelphia Law Association, has often been engraved, and is perhaps the best known of all.

The crayon portrait in profile, drawn by St. Mémin in 1808, which has always remained in the family of the Chief Justice, and been considered by them an excellent likeness, and is now owned by a descendant in Baltimore; the bust by Frazee, bequeathed by Mr. Justice Story to Harvard College, and familiarly known by numerous casts; and that executed by Powers, by order of Congress, soon after the Chief Justice's death, for the Supreme Court room—all show that, while his hair grew rather low on the forehead, his head was high and well shaped, and that, as was then not unusual, he wore his hair in a queue.

His dress, as shown in the full-length portrait by Hard-

ing, and as described by his contemporaries, was a simple and appropriate, but by no means fashionable, suit of black, with knee breeches, long stockings, and low shoes with buckles.

You may think, my friends, that I have been led on to spend too much time in endeavoring to bring before you the bodily semblance of the great Chief Justice. Yet you must admit, as he did in his letter to Delaplaine, that portraits of eminent men are "an object of considerable interest."

But, after all, it is not the personal aspect of a great man, it is his intellect and his character, that have a lasting influence on mankind. *Ut vultus hominum, ita simulacra vultus imbecilla ac mortalia sunt. Forma mentis aeterna; quam tenere et exprimere, non per alienam materiam et artem, sed tuis ipse moribus possis.*

Brethren of the Bar of the Old Dominion; Fellow-citizens of the United States:

To whatsoever professional duty or public office we may any of us be called, we can find, in the long line of eminent judges with whom Almighty Providence has blessed our race, no higher inspiration, no surer guide, than in the example and in the teachings of JOHN MARSHALL.

NOTE.—The pamphlet edition of the foregoing address contains the following list of

SUPREME COURT DECISIONS REFERRED TO BY MR. JUSTICE GRAY.

Bank of United States v. Deveaux (1809), 5 Cranch, 61.  
Bollman & Swartwout, *Ex parte* (1807), 4 Cranch, 75.  
Boyle v. Zacharie (1832), 6 Peters, 635, 648.  
Brown v. Maryland (1827), 12 Wheaton, 419.  
Chisholm v. Georgia (1793), 2 Dallas, 419.  
Cohens v. Virginia (1821), 6 Wheaton, 264.

Dartmouth College v. Woodward (1819), 4 Wheaton, 518.  
 Elmendorf v. Taylor (1825), 10 Wheaton, 152.  
 The Exchange (1812), 7 Cranch, 116.  
 Fletcher v. Peck (1810), 6 Cranch, 87.  
 The Genesee Chief (1851), 12 Howard, 443.  
 Gibbons v. Ogden (1824), 9 Wheaton, 1.  
 Hans v. Louisiana (1890), 134 U. S. 1.  
 Hollingsworth v. Virginia (1798), 8 Dallas, 378.  
 Hope Insurance Company v. Boardman (1809), 5 Cranch, 57.  
 Hylton v. United States (1796), 3 Dallas, 171.  
 Louisville Railroad Company v. Letson (1844), 2 Howard, 497.  
 McCulloch v. Maryland (1819), 4 Wheaton, 316.  
 Marbury v. Madison (1803), 1 Cranch, 137.  
 Martin v. Hunter's Lessee (1816), 1 Wheaton, 304.  
 Ogden v. Saunders (1827), 12 Wheaton, 213.  
 Osborn v. Bank of United States (1824), 9 Wheaton, 738.  
 Stuart v. Laird (1803), 1 Cranch, 299.  
 Sturges v. Crowninshield (1819), 4 Wheaton, 122.  
 The Thomas Jefferson (1825), 10 Wheaton, 428.  
 United States v. Peters (1809), 5 Cranch, 115.  
 United States v. Wiltberger (1820), 5 Wheaton, 76.  
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## STATE OF MAINE.

The tenth annual meeting of the State Bar Association of Maine was held in the Senate Chamber at Augusta on Monday, February 4, 1901, at three o'clock p. m., in order, among other things, to celebrate the centennial of the accession of Chief Justice Marshall to the bench of the Supreme Court of the United States. Hon. Albert M. Spear of Gardiner, Vice-President of the Association, presided in the absence of the President.<sup>1</sup>

### Mr. White's Introductory Address.

In the address of the President, Hon. Wallace H. White of Lewiston, which was read by Mr. Spear, it was said:

As I have read and reflected upon the life and character of John Marshall, I have been profoundly impressed with the thought of how true it is that Providence seems to raise up great men for great occasions. The history of the world is full of illustrations of this over-ruling Providence in the affairs of men. There is always in great political events, or on the fields of military glory or renown, something to stir the heart and to excite the feelings and the passions, but the crowning glory of Marshall's life was in a field of human activity which makes no appeal to the feelings or to sentiment.

For nearly thirty-five years of his life he presided over

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<sup>1</sup> A full account of the proceedings may be found in the official publication entitled: "Proceedings of the Tenth Annual Meeting of the Maine State Bar Association held at Augusta, Maine, February 4, 1901. Augusta: Press of Charles E. Nash, 1901."

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the Supreme Court of the United States at a time when our Constitution was an untried experiment in the history of nations, when its very adoption was looked upon by many honest, able and sincere men as marking the destruction of our liberties, even as now the questions growing out of the acquisition of territory following the Spanish war is looked upon by some of our public men as dangerous to the safety of our beloved country, and as even threatening the perpetuity of our institutions.

Mr. John Fiske speaks of Marshall as "Second to none among all the illustrious jurists of the English race." And of his work in interpreting the Constitution, he says: "It was thus that the practical working of our Federal Constitution during the first thirty years of the nineteenth century was swayed to so great an extent by the profound and luminous decisions of Chief Justice Marshall that he must be assigned a foremost place among the founders of our Federal Union." However entrancing this theme, it is not for me to occupy your time with any reflections and observations of mine upon the presence of such a man as John Marshall as the Chief Justice of the Supreme Court at so trying and important a period in the development of constitutional government in this nation.

We have with us to-day a distinguished lawyer who long practised in the courts of our State, winning for himself a reputation for learning and ability in the profession which none have excelled and few equaled. He has been called from the practice of the profession to occupy a distinguished position as one of the Judges of the Circuit Court of the United States, and it is with great pleasure that I present to you as the orator of the day, the Honorable William L. Putnam, of Portland.

**Address of William L. Putnam.**

Forty-five years ago this winter, through some singular coincidences, it became necessary for me, although not twenty-one years of age, to call to order the House of Representatives of this State, and to preside over it until it completed a temporary organization in the absence of the Speaker and the Clerk. The whole scene is photographed on my memory with the same distinctness as though it occurred but yesterday. The chaplain who offered prayer became the reverend Bishop of the Diocese of Michigan. By some happening, the two gentlemen who reported for the local papers at Augusta for both the Senate and the House sat at that time, one at my right and one at my left, at the miniature desks then reserved for such uses. One became the candidate of a great party for the Presidency, and the other the Chief Justice of the United States. These, except the Chief Justice, and, also, the then Governor of the State, fearless and able, the distinguished President of the Senate, afterwards more distinguished as Senator and Secretary of the Treasury, the honored Speaker of the House, and the long array of the many eminent gentlemen who held seats in the two branches of that unrivaled Legislature, have passed to their reward, and the generations of men have been re-created; yet the same hills surround us, the same blue sky is over our heads, and the same flag waves from the dome of this capitol. Thus we have, in microcosm, the greater series of events the beginnings of which we are honoring to-day. Through all the mutations which have occurred in the affairs of our nation, with all the upheavals which have shaken and re-created Europe, the great principles of constitutional law, enun-

ciated by John Marshall nearly a century ago, remain as fixed as the fundamental rules of right and justice.

Marshall was born in 1755. He was educated at the domestic hearth until he entered the Revolutionary army, where he rendered good service; and afterwards, beginning, indeed, while in the army, he laid at Richmond the foundations of his legal knowledge. He held many political offices. He took part in the Virginia Constitutional Convention. As a member of Congress, he offered the famous resolutions of General Lee: "Washington, first in peace, first in war, and first in the hearts of his countrymen!" John Adams made him Secretary of State, and afterwards, on January 31, 1801, commissioned him as Chief Justice of the United States. His French envoyship marked the critical stage in that violent political rending apart which preceded the administration of Jefferson. As unpopular as was John Adams in many sections, the insults Talleyrand heaped on our envoys stirred a universal sentiment of patriotism, which, for the time being, swept away Jeffersonianism, gave birth to "Hail Columbia," and received Marshall on his return from Paris with loud acclaim. All this, however, was soon succeeded by the Kentucky resolutions, devised by Jefferson, than which nothing could have been more hostile to those who, like Marshall, shared the deeply seated sentiments of Washington. It was when the wave which had floated the administration of Adams had receded, that Marshall was made Chief Justice, in open defiance of Jefferson and his supporters, and subject to their bitter and determined hostility. It was, however, the issues of the Jeffersonian political struggle which made him monumental.

The most trustworthy as well as the most objective

characterizations of Marshall are the contemporary pictures drawn by Joseph Story. In a letter from Washington in 1808, Judge Story described his physical traits vividly:

"Marshall is of a tall, slender figure, not graceful nor imposing, but erect and steady. His hair is black, his eyes small and twinkling, his forehead rather low, but his features are in general harmonious. His manners are plain, yet dignified; and an unaffected modesty diffuses itself through all his actions. His dress is very simple, yet neat; his language chaste, but hardly elegant; it does not flow rapidly, but it seldom wants precision. In conversation he is quite familiar, but is occasionally embarrassed by a hesitancy and drawling. His thoughts are always clear and ingenious, sometimes striking, and not often inconclusive; he possesses great subtlety of mind, but it is only occasionally exhibited. I love his laugh,—it is too hearty for an intriguer,—and his good temper and unwearied patience are equally agreeable on the bench and in the study. His genius is, in my opinion, vigorous and powerful, less rapid than discriminating, and less vivid than uniform in its light. He examines the intricacies of a subject with calm and persevering circumspection, and unravels the mysteries with irresistible acuteness."

Soon after Marshall's death, Story thus analyzed his character:

"When can we expect to be permitted to behold again so much moderation united with so much firmness, so much sagacity with so much modesty, so much learning with so much experience, so much solid wisdom with so much purity, so much of everything to love and admire, with nothing, absolutely nothing, to regret? What, in-

1801

deed, strikes us as the most remarkable in his whole character, even more than his splendid talents, is the entire consistency of his public life and principles. There is nothing in either which calls for apology or concealment. Ambition has never seduced him from his principles, nor popular clamor deterred him from the strict performance of duty. Amid the extravagancies of party spirit, he has stood with a calm and steady inflexibility; neither bending to the pressure of adversity, nor bounding with the elasticity of success. He has lived as such a man should live (and yet, how few deserve the commendation!), by and with his principles. Whatever changes of opinion have occurred, in the course of his long life, have been gradual and slow; the results of genius acting upon larger materials, and of judgment matured by the lessons of experience. If we were tempted to say, in one word, what it was in which he chiefly excelled other men, we should say in wisdom; in the union of that virtue, which has ripened under the hardy discipline of principles, with that knowledge, which has constantly sifted and refined its old treasures, and as constantly gathered new."

"But, interesting as it is to contemplate such a man in his public character and official functions, there are those who dwell with far more delight upon his private and domestic qualities. There are few great men, to whom one is brought near, however dazzling may be their talents or actions, who are not thereby painfully diminished in the estimate of those who approach them. The mist of distance sometimes gives a looming size to their character; but more often conceals its defects. To be amiable, as well as great; to be kind, gentle, simple, modest and social, and at the same time to possess the rarest endowments of mind, and the warmest affections, is a union of

qualities which the fancy may fondly portray, but the sober realities of life rarely establish. Yet it may be affirmed by those who have had the privilege of intimacy with Mr. Chief Justice Marshall, that he rises, rather than falls, with the nearest survey; and that in the domestic circle he is exactly what a wife, a child, a brother and a friend would most desire. In that magical circle, admiration of his talents is forgotten in the indulgence of those affections and sensibilities which are awakened only to be gratified."

Marshall died on the sixth of July, 1835. In the previous month, Story, anticipating his end, wrote of him in most expressive terms: "I shall never see his like again! His gentleness, his affectionateness, his glorious virtues, his unblemished life, his exalted talents, leave him without a rival or a peer."

As these expressions cover alike personal traits and judicial attainments and powers, we will not venture to touch with our brush this complete portrait, painted by the master hand; but we will briefly point out the permanency of the victory which Marshall won.

As we have already suggested, his struggle was against Jeffersonianism; and here we will define what we mean by Jeffersonianism for the purpose of this address. We lay aside those fictitious issues, made through misunderstandings or misapprehensions of the position of the Constitutionals, including Washington and Marshall. We also lay aside Jefferson's enormous contributions to the general leavening of the lump, as to which nothing distinctly Jeffersonian remains, and as to which the initiatory movements, as usually happens, were like the flood which precedes the visible turning of the tide; so that what is added by this individual or that one is not

computable. We limit our definition to that class of theories which were peculiar to the Virginia cabal, and which found expression in the Kentucky Resolutions, and in the action of the Court of Appeals of Virginia, defying the mandate of the Supreme Court of the United States. All these, so far as the Federal courts are concerned, were, in effect, crushed in 1816, under the judicial presidency of Marshall, in the famous judgment in *Martin against Hunter*. This Jeffersonianism was, indeed, nullification. In 1822, Story, though he began as a Jeffersonian Republican, writes: "Mr. Jefferson stands at the head of the enemy of the Judiciary, and I doubt not will leave behind him a numerous progeny bred in the same school." Jefferson confessed this himself in his letter to Ritchie, wherein he wrote: "The judiciary of the United States is a subtle corps of sappers and miners, constantly working underground to undermine the foundations of our confederated fabric." "An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy and timid associates, by a crafty chief judge who sophisticates the law to his mind by the turn of his own reasoning."

Jefferson's hostility betrayed Marshall into his only unjudicial act in *Marbury against Madison*, where the court went as far beyond its jurisdiction as it afterwards did in the case of *Dred Scott*. Of this, McMaster, in his *History of the People of the United States*, says: "The Court and the President were at war. The issue was promptly accepted, and Chief Justice Marshall hurled back a defiance from the Supreme Bench. The opportunity for this defiance was afforded by the famous case of *Marbury against Madison*." "When Jefferson read



the decision he was more incensed against the Court than ever. The bold language in which the Chief Justice had defined the Executive power, had set forth the Executive duties, had accused the President of violating a vested legal right, above all, the unusual way in which the decision had been made, could mean nothing else than defiance." "Jefferson justly felt that John Marshall had openly defied him. His friends shared this feeling, and went forward more eagerly than ever in their new attack on the last remnant of Federal power."

To see is to believe; and so Henry Adams, in describing the scene when Marshall administered the oath of office to Jefferson at his first inauguration, brings out the issues between them in the sharpest lines: "In this first appearance of John Marshall as Chief Justice to administer the oath of office lay the dramatic climax of the inauguration. The retiring President, acting for what he supposed to be the best interests of the country, by one of his last acts of power, deliberately intended to perpetuate the principles of his administration, placed at the head of the judiciary, for life, a man as obnoxious to Jefferson as the bitterest New England Calvinist could have been; for he belonged to that class of conservative Virginians whose devotion to Washington, and whose education in the common law, caused them to hold Jefferson and his theories in antipathy. The new President and his two Secretaries were political philanthropists, bent on restricting the powers of the national government in the interests of human liberty. The Chief Justice, a man who in grasp of mind and steadiness of purpose had no superior, perhaps no equal, was bent on enlarging the powers of government in the interests of justice and nationality. As they stood face to face on this threshold

of their power, each could foresee that the contest between them would end only with life."

But Jeffersonianism, as it came at issue with Marshall, died before the close of Jefferson's first administration. Its coffin was made by Jackson in his struggle against Calhoun, and it was buried in the Civil War, while Marshall's work endures to the day of this one hundredth anniversary. Jefferson had both the sword and the purse, while Marshall had neither. Marshall could appeal only to the sober thought of the country, commencing his appeals at a period when the Federal courts were attacked by a fierce and continued tempest, sweeping over the hills and through the valleys with a volume and persistency never since equaled. Nevertheless, McMaster writes of Jefferson's re-election, when the Federalists secured but fourteen electoral votes: "The great mass of the men who, in 1800, voted for Adams, could in 1804 see no reason whatever for voting against Jefferson. Scarcely a Federal institution was missed. Not a Federal principle had been condemned. They saw the debt, the bank, the navy still preserved; they saw a broad construction of the Constitution, a strong government exercising the inherent powers of sovereignty, paying small regard to the rights of States, and growing more and more national day by day, and they gave it a hearty support, as a government administered on the principles for which, ever since the Constitution was in force, they had contended."

This was the demonstration of an early reaction in favor of the permanent acknowledgment of the constitutional principles maintained by Marshall, whose power and success in perpetuating them we formally recognize to-day. During the century, Europe has been constitutionally revolutionized, and the kaleidoscope of its map

has been completely changed. Old flags have disappeared, and new flags, to some extent, have taken their places. The United States, also, have passed through the throes of one of the greatest civil strifes of modern times; yet the language of the Supreme Court, as uttered through Chief Justice Waite, Mr. Justice Miller, and other Justices who have spoken for it subsequently to all these great convulsions, repeats constantly what was said by Marshall. A comparison carefully made, and stated in a summary manner, between the stability of constitutional principles in the United States during the last century, and their instability elsewhere in the civilized world, leaves a conviction which startles all superficial understandings in reference thereto.

It is said the Constitution has been changed in its essential features by amendments. An amendment is constitutional; and, therefore, we might set up a technical answer to this. But we put it on broader grounds. An amendment to the Constitution in violation of its fundamental principles would be, in every just sense, an essential change; but none of that nature have been made. The earlier amendments were in truth a part of the original Constitution. Then came two relating merely to matters of detail. Afterwards came those which grew out of the Civil War, but which constituted a natural development of the great principles of the Constitution. Take the amendment abolishing slavery! It did little more than recognize an existing condition of things. But we think a fair reading of the history of the constitutional period satisfies that, between the express threat against the slave trade on the ocean at the East and the Ordinance of 1787 on the West, the fathers considered that they had so shut in slavery on the front and on the

rear that, in time, it would die for want of food. The expansion of the slave power which resulted in the war and in the latest constitutional amendments was not in their contemplation; and when, as the consequence thereof, slavery was abolished, the country did not depart from the underlying sentiment of the Constitution, but oscillated back to it. So also those amendments prohibiting the States from jeopardizing the life, liberty and property of our fellow-citizens! These were simply the application to the States of the great civil guaranties which the Constitution originally demanded from the Federal government.

Let us look at the great sanctions in behalf of liberty which we find in the Constitution; the division into three great Departments, the executive, the legislative, and the judicial; the judicial power made independent and placed beyond the control of faction; the veto power; the *habeas corpus*; the prohibition of *ex post facto* laws, and of all laws for the deprivation of life, liberty or property without due process; all the provisions against discriminations in favor of States or sections; the protection thrown around those charged with crime; the security of trial by jury; the right to the enjoyment everywhere of the privileges and immunities of citizens of the several States; these were the great guarantees of the Constitution! We ask you, whether, after the lapse of a century, they do not all shine to-day like the constellations? The builders of our Constitution had not been without practical experience. Almost every State, at the time the Federal Constitutional Convention met, had a written constitution, which had the great guarantees of which we have spoken. But with regard to the relations of the States to the Federal government, they trod a path never blazed. On the

one hand, they came together to make a more perfect Union; on the other, they did not forget that the towns and the individual colonies had been able to meet successfully, first the tyranny of Great Britain, exercised through civil authorities, and, afterwards, her armed forces. The two were at different poles, and were to be counterbalanced. The machinery for this was necessarily experimental. It was not possible that it would not oscillate. But, whenever here we take the great landmarks set by the Supreme Court, whose decisions ultimately control, both directly and by appealing to the hearts and good sense of the people, they stand as they always stood. Chief Justice Waite, speaking in behalf of the Supreme Court in 1876, said:

“The government thus established and defined is to some extent a government of the States in their political capacity. It is also, for certain purposes, a government of the people. Its powers are limited in number, but not in degree. Within the scope of its powers, as enumerated and defined, it is supreme and above the States; but beyond, it has no existence. It was erected for special purposes, and endowed with all the powers necessary for its own preservation and the accomplishment of the ends its people had in view. It can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction. The people of the United States resident within any State are subject to two governments: one State, and the other National; but there need be no conflict between the two. The powers which one possesses the other does not. They are established for different purposes and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a com-

plete government, ample for the protection of all their rights at home and abroad."

Mr. Justice Miller, in his address at the semi-centennial of the University of Michigan in 1887, in closing his comparison of the decisions of the Supreme Court since the War of the Rebellion with those before, said: "The necessity of the great powers, conceded by the Constitution originally to the Federal government, and the equal necessity of the autonomy of the States and their power to regulate their domestic affairs, remain as the great features of our complex form of government."

Everything thus said only echoes Marshall and his associates. Personal theories have nothing to do with historical questions, but we are persuaded that while, in view of the great and rapid growth of our affairs, we have been impatient at the lack of the restraints of law, and have, therefore, appealed to the stronger power, yet, as our interests become settled, the distinctive forces of the Federal government and the several States will be more thoroughly valued, and we will adhere the more closely to the fundamental sentiment which underlies our composite political structure.

It is said that certain usages have intervened, that certain practices have grown up, which are additional to the Constitution, and which, in some sense, have avoided its purposes. We cannot to-day follow this topic through. You recall the question of the purchase of Louisiana, and the questions of local government which its acquisition temporarily presented. Whatever has been said concerning them, one thing is certain: In the end no fundamental right guaranteed by the Constitution was diminished thereby. On the other hand, the borders have been extended within which its principles have effect.

Washington, as you recollect, in his Farewell Address, deprecated a foreign policy for the United States as those words are commonly understood. Nothing in the Constitution, either in the preamble or the text, indicates anything more than a desire to secure internal happiness and prosperity, or any purpose of aggrandizement, or of impressing ourselves on other nations by force or diplomacy. Therefore, Washington laid down the cardinal principles to govern our relations to others, as follows: "Observe good faith and justice towards all nations; cultivate peace and harmony with all. Religion and morality enjoin this conduct, and can it be that good policy does not equally enjoin it?"

He had especially in mind our relations with the nations across the Atlantic. Probably no part of that remarkable paper, which has impressed itself upon our people more than any other since the Constitution, sank deeper into the hearts of his fellow-citizens than this caution against involving ourselves in the political entanglements of Europe. The "Monroe Doctrine" is, in a certain sense, the supplement of the cautions of Washington. "We will not interfere in the affairs of Europe, and Europe is not to interfere in ours." There was in this a rough equity: "You let us alone, and we will let you alone," which appealed strongly to the American heart; and, if there were anything which can be said to have been added to the Constitution, without going through the forms of an amendment, it was this.

The foreign policy thus developed was, indeed, outside of the purview of the letter of the Constitution, but it may well be accepted as within the spirit of its preamble, which declared that the purpose was to insure domestic tranquillity and to provide for the common defense. As

we have already said, there is no doubt that the framers of the Constitution looked only to protecting and preserving what we had, and that they had no thought of aggrandizement. The slogan at the early part of the nineteenth century was: "Not one cent for tribute," and especially: "Millions for defense." It may justly be claimed that the acquisition of islands, alien to our habits, threatens to reverse the traditions of our government, as they have existed for more than a century; but, should these acquisitions, in practical experience, develop anything which permanently contradicts the fundamental rules which have guided the nation, the schooling of the past, especially the Constitutional victories won by Marshall, justify the expectation that we will seasonably throw it off.

Thus it was that our fathers planted deeply the tree of Liberty, so that it stands, and ought to stand, firm and unshaken by the force of time. We invoke Bancroft: "Never may its trunk be riven by the lightning, nor its branches crash each other in the maddening storm, nor its beauty wither, nor its root decay!" Nevertheless, nothing was ever truer than that the price of liberty is eternal vigilance. A half century ago, Webster, Clay, Benton, Crittenden, Johnson, were denounced as "Union shriekers;" but Carl Schurz, in his eulogy on Sumner, points out with wonderful force how it was that the constancy of statesmen of that class, in stimulating a deep love for the Union, girded up the loins of our people, so that they met successfully the shock of the Rebellion. While we are boasting of the achievements of the nineteenth century, let us not forget that, beginning with the years of the Declaration of Independence, and closing with the years of the adoption of the Constitution,



the eighteenth century gave mankind a boon far beyond anything which the era just closed has given it! Let us cherish this as the work of the most value to mankind, and of the most far reaching influence, since the great Reformation! Let us not forget that Gladstone declared the Constitution of the United States the greatest product of human genius struck out at a single blow! And let us strive unceasingly to infuse our generation with the study of it, and the love of it, remembering that, while Webster was the greatest of the later keepers of the light which shone out over the civilized world from the unpretentious hall at Philadelphia, Marshall was the first to shield it, so that ever since its radiance has been steady, strong and clear.

#### CELEBRATION AT BOWDOIN COLLEGE.

An address was delivered at Bowdoin College by the Hon. Charles Freeman Libby, A. M. That address is given below, from which there has been reluctantly omitted, for want of space, certain biographical and other matter contained in the preceding addresses or not having any immediate reference to the judicial career and services of Marshall.

##### **Address of Charles Freeman Libby.<sup>1</sup>**

To-day marks the first centennial of the installation of John Marshall as Chief Justice of the United States. Among the distinguished men who have held that high

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<sup>1</sup> This address has been published by Bowdoin College with the following title: John Marshall: An address delivered at the College on February 4, 1901, the Centenary of the Installation of John Marshall as Chief Justice of the United States, by Hon. Charles Freeman Libby, A. M.

office, he has been deemed by the American Bar Association as worthy of special honor. At the annual meeting of the Association held in Buffalo in 1898 a committee was appointed, consisting of one member from each State and Territory and from the District of Columbia, to bring the matter of a proper observance of "John Marshall Day" to the attention of the bench and bar of the United States. The committee has recommended that not only the Bar Associations of the several States should appropriately observe the day, but that commemorative exercises should be held in all schools of law and institutions of learning throughout the country, "to the end that the youth of our country may be made more fully acquainted with Marshall's noble life and distinguished services;" for the lessons that are to be learned from a study of the life and services of the "Great Chief Justice" are valuable not only to the legal profession, but to all who are students of our constitutional history, and who can draw inspiration from a life of rare usefulness and virtue.

In the time allowed to me I cannot hope to give anything like a full sketch of the varied services which John Marshall rendered to the republic, but only to present an imperfect sketch of his character and of the salient features of his career, which filled more than the allotted span of life and was crowded with splendid achievement. If what I may say shall lead the young men of this generation to a higher appreciation of the simplicity, beauty, and nobility of the character of John Marshall, I shall have accomplished the object I have in view in accepting the invitation to address you. A cursory study of his life brings out prominently the fact that we are dealing with a man of large natural endowment, whose strength was derived from a vigorous ancestry, unaided by the discipline

of the schools. He is a striking example of how great a factor heredity is in the life of the individual and how subtle and far-reaching is its influence. We are the product, as has been well said, not only of the yesterdays of our own lives, but of the many yesterdays of our ancestors.

Happy is the individual who not only is born with a sound mind in a sound body, but who lives in an environment which stimulates him to his highest efforts. While Marshall was fortunate in his ancestors, he was equally fortunate in his environment. He lived in times which quickened into early growth the strong qualities of his nature and furnished ample opportunity for their highest exercise. A lesser man than he might not have seen or seized these opportunities, but therein lay the quality of the man. At his birth the mutterings of the storm which burst nineteen years later were already heard. The fatuous policy of the mother country of denying to her colonists the rights of Englishmen, and of encroaching upon their liberties by oppressive legislation, had already begun to arouse a spirit of rebellion, which needed only the flash of the first gun at Lexington to burst into open revolt. These colonists had been educated in a stern school, in which religious and political freedom were not empty phrases, but energizing truths. The progress from loyalty to rebellion was slow, but sure, and accompanied by a progressive education in the science of government, which found its ultimate expression in the Declaration of Independence and the Constitution of the United States. This education involved much discussion of political principles in public and in private; but the magnitude of the issues lifted the subject out of the commonplaces of controversy, and invested it with an importance peculiarly

its own, for the issues were real and vital. In those days, political philosophy found its object-lesson in the blindness and obstinacy of the mother country. "No taxation without representation" became a political slogan, and patriotism took concrete form in resistance to tyranny. No one could live in such an atmosphere without imbibing an ardent love of liberty and a high conception of civic responsibilities.

In such times as these John Marshall was born, September 24, 1755, in the little village of Germantown, in the frontier county of Fauquier, in Virginia. He came of good English, Scotch and Welsh stock. His father was Colonel Thomas Marshall, a land surveyor, who accompanied his schoolmate, George Washington, in his surveying expeditions for Lord Fairfax. He was a man of marked ability and vigorous intellect, and overcame the defects of early education by a diligent cultivation of his natural powers. At a time when books were scarce in Virginia he had collected a small library of the best English authors, and devoted much of his time to the training and education of his children. How well he succeeded is shown in the career of his eldest son, whose obligations to his father were never forgotten. On this point, Judge Story, in his eulogy of Marshall, says: "My father (would he say with kindled feelings and emphasis),—my father was a far abler man than any of his sons. To him I owe the solid foundation of all my own success in life."

While John Marshall makes no special mention of his mother, I am inclined to think that he owes as much to her as to his father. There is a strain of feminine delicacy and tenderness in his composition which points to a maternal source, and his chivalrous regard for women

throughout his life must have found its prompting in some prototype in his own home. What little we know of his mother supports the theory that strong men trace their virtues to the female side. Her maiden name was Mary Isham Keith. She came of good family; for we are told that her father, James Keith, an Episcopal minister, was "cousin-german to the late Earl Marischal and to Field Marshal James Keith, one of the most valued of the great Frederick's lieutenants, who saved the Prussian army and fell at Hochkirch, 'as poor as a Scot,' though he had the ransoming of three cities." She was the mother of fifteen children, seven sons and eight daughters, all of whom she reared to mature years. The historian wisely adds, "She could have little opportunity to make any other record for herself, and could hardly have made a better one." Of the fifteen, John Marshall was the first-born, a child of rare gentleness and intelligence.

His early education was obtained at home,—at first under his father's tuition and then with a tutor, a Scotch clergyman who lived in the family. At fourteen he attended school one term at a classical academy in Westmoreland county, where his father and General Washington had been pupils. Returning home, he read Horace and Livy with his old preceptor; and this completed his early scholastic training. But he had acquired a love for good literature, and especially poetry,—which has been a food for many noble minds; and at the early age of twelve, it is said, he knew by heart a large portion of Pope's writings, and had made himself familiar with Dryden, Shakespeare, and Milton. He was fond of athletic sports and life in the open air; and to these tastes he owed the sturdy constitution which served him so

well during the exposures of military campaigns and the arduous duties of his later life.

At eighteen he commenced the study of law. But the times were not favorable for scholastic pursuits, and he became so absorbed in the questions that were agitating the public mind that his studies were interrupted. Before he was twenty years old, he had enrolled himself as a volunteer in a militia company, and with the earnestness which was characteristic of his nature devoted himself to mastering the details of military drill and tactics, preparatory for service in the field. . . .

When Marshall was appointed Chief Justice of the United States he was forty-five years of age, and had never yet filled any judicial office. While his great abilities were recognized by the legal profession and the public, he had yet to demonstrate that he possessed the qualities of a great judge. Although the Supreme Court had been in existence twelve years at this time, and three chief judges with brief terms of office had preceded him, only two decisions of that court had been made on questions of constitutional law. It is difficult for us in this generation to appreciate the difficulties that surrounded the judicial department of the government in the discharge of its duty to expound and construe the Federal Constitution. It had been adopted under great opposition, had aroused great difference of opinion among wise and patriotic men as to its true meaning on many material points, and had become a subject of heated political controversy, in which State pride and jealousy and fear of a strong central government entered as elements.

Marshall, in his *Life of Washington*, has stated in clear language the issues which then threatened to disrupt the

country. "It was," he said, "divided into two great political parties, the one of which contemplated America as a nation, and labored incessantly to invest the Federal head with powers competent to the preservation of the Union. The other attached itself to the State government, viewed all the powers of Congress with jealousy, and assented reluctantly to measures which would enable the head to act in any respect independently of the members."

At the date of his appointment no case had yet called for a decision of questions which opened up the whole scheme of the Constitution and determined the rules for its interpretation, nor had the meaning and scope of the important provisions which restrained the powers of Congress and of the States presented themselves for adjudication. The field was absolutely new. The world had never known before such a science as the law of a written constitution of government. There were no precedents, and the road had to be cut without the aid of landmarks or guides. To construct a system of jurisprudence under these conditions required a man of the highest judicial order; for it was not sufficient to give decisions which were technically correct, but it was also necessary to support them by reasons which should commend themselves to the great body of the people, and to combine all these decisions on different questions in a manner so harmonious and consistent as to create a system of constitutional law which by universal consent should become the fundamental law of the land. To accomplish this task required a mind which combined the highest judicial faculty with great intellectual strength and scope. These qualities Marshall possessed, and they enabled him to ultimately raise a structure of constitu-

tional law which entitles him to rank among the very greatest judges which the world has known.

One of the first cases calling for a construction of the Constitution with which Marshall had to deal was the suit of *Marbury v. Madison*. This case presented the question of the power of the court to set aside an act of Congress because it was in violation of the United States Constitution. The decision of this case not only set at rest this important question, but emphasized the conflicting and antagonistic views of the Constitution which were entertained by the Federalists and the Republicans of that day. Jefferson, who was then President and the recognized leader of the Republicans, did not hesitate to declare the decision a perversion of the law, and indulged in undignified and captious criticism of the Chief Justice. Looking back upon these questions after an interval of nearly a century, we cannot but rejoice that a Marshall, and not a Jefferson, was then Chief Justice; for, if the views of the latter had prevailed, the whole course of our constitutional history would have been altered, and the current of our national life been restricted within much narrower bounds. The case was presented upon a petition for mandamus, requiring Madison, who was then Secretary of State, to deliver a commission to Marbury, who had been appointed and confirmed by the Senate as a justice of the peace for the District of Columbia before President Adams retired from office, but whose commission had not been delivered, although signed by the President and sealed with the seal of the United States, when Jefferson came into office. The court decided that Marbury was entitled to the commission, and that the withholding of it was a violation of a vested right, but also held that the Supreme Court had no ju-



risdiction over the case because the act of Congress conferring the power on the Supreme Court was unconstitutional.

How great a landmark this was in constitutional law, we of this generation, who have become accustomed to the exercise of the regulative power of the Supreme Court in matters of legislation, can hardly appreciate; but at the time it was made it seemed little less than revolutionary to lawyers who had been trained in the common law, and educated in the English theory that the legislative department of the government was omnipotent. For such men it was difficult to conceive how any law which the legislature might pass, and the executive approve, could be set aside by a mere judgment of a court. It was a novelty in jurisprudence, and no precedent could be found to sustain it in ancient or modern history. Although the Constitution declared that the judicial power should extend to "all cases arising under the Constitution and the laws of the United States," when the question was first presented in a Federal court, this power seemed so fraught with evil and so far-reaching in its consequences that escape was sought by a narrow and strained construction of its provisions. . . .

Following this the court was called upon in *Fletcher v. Peck* to pass upon the constitutionality of an act of the Legislature of the State of Georgia, which was pronounced to be null and void as in violation of the United States Constitution. The same objections which attached to the exercise of the power of the court in the former case were intensified in this case by a feeling that the independence of the State governments was threatened by the jurisdiction claimed by the court. The question at issue was the ownership of a tract of land, for which one

Legislature had granted a patent which a subsequent Legislature had repealed. Again Marshall pronounced the judgment of the court which established the doctrine that under the Constitution the States are prohibited from passing laws impairing the obligation of contracts, and that the power of the court was sufficient to protect even an individual against the injustice of a State.

This principle was again invoked in the celebrated Dartmouth College case, the opinion in which, to quote the language of one of the present justices of the Supreme Court, "contributed as much as any he ever delivered to the great reputation of Chief Justice Marshall," and settled the doctrine that a charter of a private as distinguished from a public corporation is a contract within the protection of the Federal Constitution, so that it has ever since been recognized as a "canon of American jurisprudence, whose doctrines," in the language of Chief Justice Waite, "have become so imbedded in the jurisprudence of the United States as to make them, to all intents and purposes, a part of the Constitution itself." The facts were these: A charter had been granted by the crown to Dartmouth College in 1769, placing its government in the hands of a board of trustees, and providing for their succession; and on the faith of this charter the college had been privately endowed. In 1816 the Legislature of New Hampshire attempted to amend the charter and change its form of government; but the trustees of the college refused to accept the acts, and recourse was had to the State courts, where judgment was given against them, and appeal was taken to the Supreme Court of the United States. Mr. Webster and Mr. Hopkinson appeared for the college; and Mr. Wirt, then Attorney-General of the United States, and Mr. Holmes appeared

on the other side. The principal arguments were made by Mr. Wirt and Mr. Webster. The latter had argued the case in the court below, and was familiar with the whole controversy. He was a graduate of the college, and his devotion to his Alma Mater led him to exert all his powers in her defense. His argument was considered one of the most masterly efforts of his professional life. Towards its close he was overcome by emotion, and paused to recover his composure. Looking at Chief Justice Marshall, he said in those deep tones which so often thrilled the hearts of an audience, "I know not how others may feel; but, for myself, when I see my Alma Mater surrounded, like Cæsar in the Senate House, by those who are reiterating stab upon stab, I would not for this right hand have her turn to me and say, '*Et tu quoque, mi fili.*'" The importance of this decision is well stated by one of the eulogists of Marshall, who says: "The case of Dartmouth College is the bulwark of our incorporated institutions for public education, and of those chartered endowments for diffusive public charity which are not only the ornaments but among the strongest defenses of a nation. It raises them above the reach of party and occasional prejudice, and gives assurance to the hope that the men who now live may be associated with the men who are to live hereafter, by works consecrated to exalt and refine the people, and destined, if they endure, to unite successive generations by the elevating sentiment of high national character." It is not without interest to add that our own Alma Mater invoked successfully the doctrine of this great case for the protection of her chartered rights against legislative action by the State of Maine nearly seventy years ago, when the State attempted to change the constitution of its boards, and to exercise

a direct influence in the management of its affairs; and it is not less interesting to know that the friend and associate of Marshall for more than twenty years on the Supreme Bench — the learned author of the "Commentaries on the Constitution," Judge Story — delivered the opinion in this case which restored Bowdoin College to its ancient charter and privileges.<sup>1</sup>

The case of *Cohens v. The State of Virginia* presented the important question whether the Supreme Court could exercise jurisdiction where one of the parties was a State and the other a citizen of the same State, and whether in the exercise of its jurisdiction it could revise the judgment of a State court on a question arising under the Constitution and laws of the United States. The court held that it had jurisdiction over both questions, and in the course of his opinion the Chief Justice used the following memorable language: "It [the Supreme Court] is authorized to decide all cases of every description arising under the Constitution or laws of the United States. From this general grant of jurisdiction no exception is made of those cases in which a State may be a party. When we consider the situation of the government of the Union and of a State in relation to each other, the nature of our Constitution, the subordination of the State governments to that Constitution, the great purpose for which jurisdiction over all cases arising under the Constitution and laws of the United States is confided to the judicial department, are we at liberty to insert in this general grant an exception of those cases in which a State may be a party? Will the spirit of the Constitution justify this attempt to control its words? We think it will not.

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<sup>1</sup> This case will be found reported at length in Sumner's Reports, vol. 1, pp. 276-318.

We think a case arising under the Constitution or laws of the United States is cognizable in the courts of the Union, whoever may be the parties to that case. . . . The laws must be executed by individuals acting within the several States. If these individuals may be exposed to penalties, and if the courts of the Union cannot correct the judgments by which these penalties may be enforced, the course of the government may be at any time arrested by the will of one of its members. Each member will possess a veto on the will of the whole." / . . .

In 1807 Chief Justice Marshall presided over the trial of Aaron Burr, in the Circuit Court of the United States in the city of Richmond, Virginia, on an indictment for the crime of high treason in levying war against the United States. Burr had been Vice-President of the United States, and had come within one vote of being elected President; and his successful competitor was then President. He had killed Hamilton in a duel in July, 1804, and was bitterly hated by the Federalists for causing the death of their great leader. These and other acts had brought him into disrepute; and his restless ambition was seeking new fields for its exercise, and he thought he had found it in an expedition which he set on foot against the Spanish possessions lying to the south of the United States.

In 1805 he made preparations for the invasion and conquest of Mexico, and contracted for the construction, on the Ohio River, of a number of transports for the expedition, a part of which assembled at Blennerhassett's Island in the State of Virginia, where the main depot of supplies and stores was established. At this point a force of some thirty or forty armed men assembled as the nucleus of his future army; but further operations were arrested by a

proclamation of the President, denouncing the scheme and ordering the arrest of all participants. Burr, among others, was arrested and brought to Richmond for trial, and was defended by distinguished counsel, including the late Attorney-General, Randolph, and Luther Martin, of Maryland. The trial attracted a large number of citizens, not only from Virginia, but from other States, and aroused throughout the country great interest and excitement. William Wirt was employed on a special retainer of President Jefferson to aid the government prosecutor at the trial; and the pressure of public opinion was exerted to obtain a conviction, which it was said the "people of America demanded." Although Burr was tried before a man who was a special friend of Hamilton, the scales of justice were held with an absolutely even hand. The framers of the Constitution, remembering the judicial murders which had been committed in England under the law of constructive treason, had wisely provided in the Constitution that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies giving them aid and comfort," and further provided "that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court." The questions to be decided were whether the assembling of a few armed men at Blennerhassett's Island constituted a "levying of war" against the United States, and as to the proof of the overt act alleged. On these questions the Chief Justice charged the jury as follows: "An assemblage to constitute an actual levying of war should be an assemblage with such force as to justify the opinion that they met for the purpose. Why is an assemblage absolutely required? Is it not to judge, in some measure,

of the end by the proportion which the means bear to the end? Why is it that a single armed individual entering a boat and sailing down the Ohio for the avowed purpose of attacking New Orleans could not be said to levy war? Is it not that he is apparently not in a condition to levy war? If this be so, ought not the assemblage to furnish some evidence of its intention and capacity to levy war before it can amount to levying war? . . . Now an assemblage on Blennerhassett's Island is proved by the requisite number of witnesses, and the court might submit it to the jury whether that assemblage amounted to a levying of war; but, the presence of the accused at that assemblage being nowhere alleged except in the indictment, the overt act is not proved by a single witness, and of consequence all other testimony must be irrelevant."

Following the law laid down by the Chief Justice, the jury brought in a verdict of "not guilty;" and the angry counsel for the government declared that "Marshall had stepped in between Burr and death."

In the course of the trial the court was asked to issue a *subpoena duces tecum*, directed to the United States marshal, commanding him to summon Thomas Jefferson, President of the United States, to appear before the court, and bring with him certain papers therein designated which Burr alleged were necessary for his defense, and which were in the possession of the Executive Department at Washington; and after a full hearing the Chief Justice ordered the *subpoena* to issue. This with other features of the trial caused great dissatisfaction on the part of the President, who had the bad taste and temper to denounce the ruling of the court as "an offensive trespass on the Executive Department of the Government," and further gave vent to his dissatisfaction with the conduct of the trial in a

message to Congress. But the judgment of posterity has sustained the course of Marshall, and it is generally admitted "that never in all the dark history of State trials was the law, as then it stood and bound both parties, ever interpreted with more impartiality to the accuser and the accused."

How fully Marshall appreciated the responsibilities and difficulties of his decision is shown in the language of his charge, where he said: "That this court dares not usurp power is most true. That this court dares not shrink from its duty is not less true. No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But, if he has no choice in the case; if there is no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country, who can hesitate which to embrace."

The rule of construction as governing the Constitution which the Chief Justice laid down in the early case of *Gibbons v. Ogden* is characteristic of the broad and firm grasp he had of the underlying principles of our government. He avoids the extreme of either broad or narrow construction of the instrument, and declares that the natural meaning of the words must govern without being wrenched in any direction. . . .

The bar of the Supreme Court of the United States, during the period of Marshall's Chief Justiceship, presented a galaxy of brilliant and distinguished names. Among them were Dexter and Webster, Hoffman, Ogden, Emmet, Rawle, Ingersoll, Sergeant, Binney, Pinkney,



Randolph, and Wirt; and the arguments of these great leaders of the bar aided not a little the labors of the court. For thirty-four years Marshall continued the series of judgments which constitute the basis of the constitutional law of this country, which, it is not too much to say, owes more to Marshall than to any other man.

How much credit is due to Marshall in this work appears by the testimony of one of his associates, who was not likely to undervalue or disparage the labors of other members of the court. In an article on Marshall, contributed during the latter's lifetime to the *North American Review* in 1828, Judge Story said: "We resume the subject of the constitutional labors of Chief Justice Marshall. We emphatically say, of Chief Justice Marshall. For, though we would not be unjust to those learned gentlemen who have from time to time been his associates on the bench, we are quite sure they would be ready to admit, what the public universally believe, that his master mind has presided in their deliberations, and given to the results a cogency of reasoning, a depth of remark, a persuasiveness of argument, a clearness and elaboration of illustration, an elevation and comprehensiveness of conclusion, to which none others offer a parallel. Few decisions upon constitutional questions have been made in which he has not delivered the opinion of the court; and in those few the duty devolved upon others to their own regret, either because he did not sit in the case, or from motives of delicacy abstained from taking an active part." But, in addition to these labors, he also dealt with other subjects where there were few precedents to guide him, such as the rights of the Indian tribes over the lands which they had formerly occupied, and as nations in the States in which they dwelt; and

in international law he had to deal with such questions as the complicated rights of neutrals and belligerents, captors and claimants, of those trading under flags of peace and those privateering under letters of marque and reprisal, together with questions of the jurisdiction and judgments of foreign tribunals in matters of prize law, where there were few precedents for their solution.

Near the close of his life, in the seventy-fifth year of his age, he was a member of the Virginia State Convention which was called in 1829 to revise the State Constitution. In that distinguished assembly there were two ex-Presidents of the United States, Madison and Monroe, besides other men of brilliant talents and national reputation. Among them Marshall was not the least distinguished. The discussions lasted several weeks, and developed great differences of opinion, accompanied with no little acrimony in debate. The Chief Justice used his great powers in urging a spirit of conciliation and compromise on many questions which had proved a source of dissension and debate; but on the question of judicial tenure of office he took a positive stand, and spoke with great earnestness and power, and in words which may well be repeated in these days, when the independence of our judges is threatened by popular elections, and the encroachment of the legislative upon other departments of the government is becoming more and more marked.

Of the personal qualities of Marshall much might be said. His father has said of him that "he never seriously displeased him in his life," and the testimony of his own family bears witness to the almost flawless quality of the man. Of how many could it be truly said, as one of his relatives has said of him: "He had no affrays in boy-

hood. He had no quarrels or outbreakings in manhood. He was the composer of strifes. He spoke ill of no man. He meddled not with their affairs. He viewed their worst deeds through the medium of charity. He had eight sisters and six brothers, with all of whom, from youth to age, his intercourse was marked by the utmost kindness and affection, and, although his eminent talents, high public character, and acknowledged usefulness could not fail to be a subject of pride and admiration to all of them, there is no one of his numerous relations who has had the happiness of a personal association with him in whom his purity, simplicity, and affectionate benevolence did not produce a deeper and more cherished impression than all the achievements of his powerful intellect."

One of his intimate personal friends has paid him this tribute: "In private life he was upright and scrupulously just in all his transactions. His friendships were ardent, sincere, and constant, his charity and benevolence unbounded. He was fond of society, and in the social circle cheerful and unassuming. He participated freely in conversation, but from modesty followed rather than led. Magnanimous and forgiving, he never bore malice, of which illustrious instances might be given. A republican from feeling and judgment, he loved equality, abhorred all distinctions founded upon rank instead of merit, and had no preference for the rich over the poor."

Unlike many judges, he knew how to unbend; and the serious side of his nature was relieved by a sense of humor which made him the most agreeable of companions. His laugh was frank and hearty, at times he was even hilarious. He was fond of young people, and entered into their pleasures with zest and enthusiasm. For more than

forty years he was a member of the Barbecue or Quoit Club of Richmond, which met for recreation once a fortnight from May till October in each year, and even in advanced years was among the most skilful in throwing the quoits. So great a favorite was he at these social gatherings that at his death it was proposed there should be no attempt to fill the vacancy, "but that the number of the club should be one less than it was before."

There is also another side to his character which should not be omitted; and that is his chivalrous respect for women, which he exhibited during all his life, and which was shown in his devotion to his wife, whom he married when he was twenty-eight years old, and with whom he lived in uninterrupted harmony for nearly fifty years.

When an old man he used to say "that it seemed to him that young men were no longer lovers, and did not know what love was, they were so lackadaisical about it." Harriet Martineau, who met him in Washington the year before his death, has written of him: "He maintained through life and carried to his grave a reverence for women as rare in its kind as in its degree."

Such was the career of John Marshall. Few men have had larger opportunities for the display of their talents. Few could have performed so well his tasks. As soldier, lawyer, statesman, diplomatist, and judge, he met every demand that was made upon him, and in such a way as to enhance his ultimate fame. Great as were his achievements, the man himself was still greater. After all has been said, his life is his best eulogy. Like a rare gem, which, however held, flashes some new phase of its beauty in the sunlight, John Marshall, from whatever side we view him, reveals some new virtue, some new source of strength. In his case we have not to discriminate be-

tween private life and public achievement, nor to throw the mantle of charity over personal defects which might mar the brilliancy of his fame. We can say of him as was said of Bayard in the days of knighthood, in private and in public life he was *sans peur et sans reproche*.

In these halls of learning dedicated to the education of youth, where lofty ideals are taught and the importance of character as well as achievement is emphasized, we do well to honor the memory of John Marshall, who illustrates in his life the happy results of combined moral and intellectual force, and the enduring quality of a fame which rests on high character as well as noble achievement.

## STATE OF NEW HAMPSHIRE.

"Marshall day" in New Hampshire was celebrated by the State Bar Association at a meeting held at Manchester, February 4, 1901. The proceedings consisted of an address by George B. French, of Nashua, the President of the Association; a principal address by Jeremiah Smith, Professor of Law at Harvard University; an address on *John Marshall as a Soldier* by Edgar Aldrich, of Littleton; and an address by Robert M. Wallace, of Milford, on *The Associates of John Marshall*.

At the annual dinner of the Association an introductory address was made by Frank S. Streeter, of Concord, and responses to appropriate sentiments were given by his Excellency Chester B. Jordan, of Lancaster; by William J. Tucker, of Hanover, President of Dartmouth College; by Charles H. Burns, of Wilton; by Oliver E. Branch, of Manchester; by Charles B. Corning, of Concord, and by John S. H. Frink, of Portsmouth. We give the principal address in full and some of the more important and characteristic portions of the others.<sup>1</sup>

**Introductory Address, by George B. French, of Nashua.**

We have assembled here not only to celebrate the anniversary of a notable event in the life of one of our pro-

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<sup>1</sup>The proceedings on John Marshall day are officially published in the Report of the Bar Association of New Hampshire (N. S.), Vol. I, No. 2, pp. 275-399, with portraits of Chief Justice Marshall and George B. French, President of the Association.

fession and in the history of our highest court, but to gather fresh strength and inspiration by studying the mind, the character and the work of one who can safely be called ideal. Since there is but little in human life that can be truly called transcendent, it is well that we should frequently recur to exalted characters and their achievements, not only as a grateful tribute, but to establish and re-establish our own ambitions and pursuits in the paths of high endeavor.

This day's work throughout the land will surely bring us to taste that omer of manna, some portion of which in every age is carefully kept and carried into the promised land of man's progress. For the first time in the country's history, the bench and the bar of the land meet throughout its breadth, and with one mind pay highest tribute to the memory of a judge. We are not moved by the influences that give birth to fulsome eulogies, such as personal associations, the shock of recent loss, the desire of gratifying a sad community, or conventional proprieties, but the conclusions of dispassionate history have gathered us in every State, to declare that the supreme worth of John Marshall's character and work as a judge has become more and more established by the flight of every one of the hundred years since he took his place as Chief Justice of our highest national court.

By the efforts of members of the bar, we have been brought to study a career and work that closed two-thirds of a century ago, and the closer our attention has been given to this remarkable man and his work, the more heartily have we indorsed the worth and usefulness of the theme.

We may also rejoice at a further happy situation, that

events were so shaped that the chief magistracy of the nation did not pass to Jefferson in 1801 quite soon enough to lose to the State this masterly mind in this greatest field of law. . . .

The distinguishing features of Marshall's power as a judge are seen in clear light when he is compared with Judge Story, who sat with him on the bench from 1811 till Marshall's death. Story was a lawyer of remarkable ability and profound learning. As we all know, he attained great distinction, not only as a judge, but as a lecturer on law, and as an author. In the Dartmouth College case both these judges furnished opinions, and the methods of argument and effectiveness of each are perhaps as well seen in that case as in any of the cases in which both took part. Marshall begins every important case by putting aside all confusing issues not vital to the decision. He clears the atmosphere by stating all the points that materially affect the question, getting right at the marrow. He carefully answers all the adverse arguments, and usually leaves practically nothing for a rehearing. When he closes his opinion, counsel are convinced that the case is sealed. He does not attempt to convince or rivet his conclusions by an exhaustive array of authorities, or any complete analysis of them. While he shows respect for authorities, he spends very little effort in reviewing them. Story says, "He discussed authorities as if the very minds of the judges themselves stood disembodied before him."

His chief aim in argument is to be unanswerably strong, wasting no force in a display of learning, nor allowing anything not vital to his conclusions to distract or confuse. He often alludes in the beginning of his opinion to the serious, if not solemn, importance, of the questions involved, and how it would be more agreeable to be rid



of deciding them, and then he states the fearless spirit with which the bench must address itself to the matter. Thus inspired with the soul of a just, weighty, and fearless purpose, the argument moves like a compact, irresistible body of soldiers.

It is hard to mention Judge Story and bestow upon him too much honor. He was most learned in all that had been written in the field of law, and he had one of the best minds that ever adorned our bench. Yet he was never the equal of Marshall in that incisiveness and originality which could go to the bottom of new questions, little aided by the investigations of the past, and unerringly reach the true conclusions.

In the Dartmouth College case Marshall did not cite a single authority, but with them Story began and ended his opinion. He was loaded with them, so much so that he was measurably hampered in his methods of developing the discussion. Marshall lost sight of a few points that Story discussed, yet you are carried along by Marshall's methods, and your doubts go down before him. You are no better satisfied by the more lengthy opinion of Story, nor does his array of authorities have any superior persuasive force after studying Marshall's opinion. Webster said of Marshall's method in the Dartmouth College case: "He reasoned along from step to step, and, not referring to the cases, adopted the principles of them, and worked the whole into a close, connected, and very able argument." His day upon the bench was not, as some one has said, the day of his "dictatorship." If his opinions were dominant, it was not the dominance of an overmastering, tyrannical will, crushing all before it, but the prevalence rather of the highest reason, pressed home under the influence of the loftiest motives and character.

There has been but one Marshall, as there has been but one Washington. . . .

But I promised myself that I would be brief, and I am anxious to be true to my purpose, for, in common with you, I await with expectant pleasure the exact and reliable judgment, the delightful thoughts, the wide survey, and selected treasures from Marshall's work that our orator, Judge Smith, has now brought to us. True to his uniform kindness, he has sacrificed much in yielding to our invitation. He is assured of one thing, that this bar deeply appreciates his effort, just as it has ever appreciated the honor that his association with it has conferred. My attempted brevity has also had in view the addresses of Judges Aldrich and Wallace, looked forward to with great pleasure.

If I have occupied too much time, let extenuation be found, not in these very general views, but in the charming character and life of the great Chief Justice, a life so replete with high ideals and devotion to the immortality of our Constitution, and the solidity of the Nation, that not to be absorbed with interest in him were evidence enough of one's failure rightly to use the privileges of this occasion, or of one's poverty in all those sentiments and principles that make for the best and highest.

*Oration by Jeremiah Smith, of Cambridge, Mass.*

Why does the legal profession throughout the land celebrate this day? Why single out one judge for such marked reverence? Why is the centennial of John Marshall's accession to the bench to be thus honored above all other days in judicial history? Is it because he played

a double part in our national life; because he was a statesman as well as a jurist; a Cabinet officer before he was Chief Justice? No. That reason would also apply to both his immediate successors, Taney and Chase. Is it because, in dealing with the ordinary questions of jurisprudence, he so far excelled all other judges that he belongs to a distinct order? No. So far as such labor is concerned, although Marshall stands at the head, there are other American jurists who must be put in the same class. Not to multiply instances, it is sufficient to name Parsons of Massachusetts, Kent of New York, Gibson of Pennsylvania, and Gaston of North Carolina.

The cause of Marshall's extraordinary pre-eminence is to be found in the fact that he was a pioneer, and a successful pioneer, in a new field, that of constitutional law.

When Marshall came upon the bench a great political revolution was just taking place. John Adams had been defeated for re-election by Thomas Jefferson, who was to be inaugurated a month later. The Federalists had lost not only the Presidency, but also both Houses of Congress. Few members of the victorious Democracy then supposed that there could be any check upon the power of their party and its leaders. They saw that they had a majority of the popular vote; and that they had with them the public functionaries who made appointments, as well as a majority of the legislative bodies which levied taxes and enacted statutes. It had not occurred to many of them (except the President-elect) that there was in the United States a department of the Government which, within its sphere, was, for the time being, superior to both President and Congress. Such, however, was in fact the position of the Supreme Court. And, by reason of the appointment of Marshall in the last months

of the Adams administration, the Federalistic theories of the Constitution prevailed in that tribunal for more than a generation, and indeed long after the Federalist party had ceased to exist as a political organization.

The experiment of a written constitution, with its checks and balances and guaranties, was not attempted in America alone. France tried the plan at the same time, and came to a disastrous result. The great distinguishing feature of the United States Constitution is, that it creates an instrument by means of which its rules and principles can be effectively enforced. It provides for the establishment of a judicial tribunal which shall be the final arbiter upon all questions relating to the alleged infractions of the Constitution. "The Supreme Court of the United States," says Sir Henry Maine, "is a virtually unique creation of the founders of the Constitution." And the novelty consists, not only in the creation of such a tribunal, but also in the manner in which its great powers can be called into exercise. Many people would say that the court ought to be compellable to pronounce upon the constitutionality of any legislative act, whenever its opinion was requested by any considerable number of citizens; or, at all events, whenever requested by the executive or legislative departments. Fortunately, however, the framers of our National Constitution saw the inherent dangers of such a method and rejected it. The remarkable power of the court "is capable only of indirect exercise; it is called into activity by 'cases,' by actual controversies, to which individuals, or States, are parties. The point of unconstitutionality is raised by the arguments in such controversies; and the decision of the court follows the view which it takes of

the Constitution."<sup>1</sup> "What the court does is simply to determine that in a given case A is or is not entitled to recover judgment against X; but in determining that case the court may decide that an act of Congress" (or a statute of a State) "is not to be taken into account, since it is an act beyond the constitutional powers of Congress" (or of the State Legislature).<sup>2</sup>

But although the power of the court is thus exercised only in this indirect manner, it is none the less an authority of illimitable force. Professor Dicey does not overstate when he says: "The law courts become the pivot on which the constitutional arrangements of the country turn." The bench "can and must determine the limits to the authority both of the Government and of the Legislature; their decision is without appeal; the consequence follows that the bench of judges is not only the guardian but also the master of the Constitution."<sup>3</sup>

To the headship of the court possessing this extraordinary power, John Marshall, of Virginia, was appointed by President Adams in the twelfth year of the United States Government. His age was then forty-five, and he had had the great benefit of an "all round" experience. He had known the vicissitudes of peace and war. As an officer of the Army of the Revolution, he had proved his courage on such battle-fields as Brandywine and Monmouth, and had exhibited the still higher quality of patient endurance during the horrors of the winter at Valley Forge. Almost at the very outset of his professional career, he had come to the front as one of the recognized leaders of the very able bar of Virginia, and had been

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<sup>1</sup> Maine on Popular Government, 217, 218.

<sup>2</sup> Professor A. V. Dicey, in 1 Law Quarterly Review, 92.

<sup>3</sup> 1 Law Quarterly Review, 97.

intrusted with the conduct of important litigations. Repeatedly a member of the Virginia Legislature, when grave questions were pending, he had also served in the convention called to determine whether the State should adopt the newly-framed United States Constitution. As a member of the special embassy to France, and afterwards as a member of Congress and as Secretary of State under President Adams, he had had experience of public life on a large scale.

Up to the time of Marshall's appointment, few of the most important constitutional controversies had come before the court. Owing to the indirect method of raising questions, the court had, as yet, seldom been called upon to decide important points in this branch of the law. But Marshall and his colleagues were soon confronted with the most fundamental of all these questions: Shall the Constitution be a living reality, or the mere shadow of a name?

If an addition is ever made to the number of days celebrated as national anniversaries, I submit that the twenty-fourth of February may well be added to the list. Upon that day, ninety-eight years ago, the Supreme Court of the United States, speaking through its Chief Justice in the famous case of *Marbury v. Madison*,<sup>1</sup> decided that if an act passed by the legislative body conflicts with the Constitution, it shall be treated as a nullity. This decision practically involves the affirmance of two propositions, and it is upon the second of these propositions that particular stress should be laid by a biographer of Marshall. The propositions here affirmed are: First, that a legislative body has no right to pass an act which violates the Constitution. Second, that, when such an act has been

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<sup>1</sup> 1 Cranch, 137.

passed by the Legislature, the court can and must treat it as a nullity, *i. e.*, the court must decide the particular case pending before it just as if such an act had never been placed upon the statute book. The affirmance by the court of proposition 1, if not followed by the affirmance of proposition 2, would have been an empty thunderbolt. Such a course would find its parallel in President Buchanan's message of December, 1860. In that celebrated document Mr. Buchanan vigorously denied the right of secession, but practically admitted that, should secession be attempted, there was no remedy, because, in his view, Congress had no right to coerce a State. No such lame and impotent conclusion was reached by Marshall and his colleagues. They held that there was a remedy for unconstitutional legislation, that it was their own peculiar province as judges to apply that remedy, and they did then and there apply it.

Our indebtedness to Marshall in this connection is not only based on the fact that he decided rightly, but also on the fact that he stated the reasons for this decision so forcibly that no lawyer can gainsay them. Two of the most effective portions of his opinion are: the paragraphs where he puts a series of deadly dilemmas; and the sentences in which he presents the practical results of the opposite view in the shape of a *reductio ad absurdum*.<sup>1</sup> But the entire opinion as to the power and duty of the court to disregard an unconstitutional act fully deserves the eulogium of Chancellor Kent, who calls it "an argument approaching to the precision and certainty of a mathematical demonstration."<sup>2</sup> Many years subsequently to this decision, an eminent lawyer, after quoting some of the most forcible sentences, said: "These are now

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<sup>1</sup> 1 Cranch, 177, 178.

<sup>2</sup> 1 Kent's Com., 453.

truisms, but they were not then, and Marshall, more than any other man, has made them to be truisms now."<sup>1</sup>

A similar result had previously been reached by subordinate courts of the United States, and by some State courts. But this was the first time that the question had been argued and decided on a great stage,<sup>2</sup> with the whole country looking on "and Clio attentive, with her pen in hand and her page before her."

Familiar as the legal profession now is with the exercise of this judicial function, it is difficult for lawyers of the present day to understand the doubts of our legal ancestors as to its existence, or to realize how much courage was then required for a court to take this position.<sup>3</sup> Almost all lawyers of that day had been born subjects of Great Britain, and had been taught that the British Parliament was omnipotent. Mr. Rawle has clearly pointed out that, although the United States Constitution declared in so many words that the judicial power should extend to "all cases arising under the Constitution and laws of the United States," "yet it was difficult for men so trained to conceive how any law, which the legislative department might pass and the executive approve, could be set aside by the mere judgment of a court. There was no precedent for it in ancient or modern history."<sup>4</sup> The contemporary feeling is evidenced by the fact that, in at least two cases (one in Rhode Island and the other in Ohio), judges of State courts were "impeached as criminals for refusing to enforce unconstitutional enactments;" and

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<sup>1</sup> 1 American Law Review, 441.

<sup>2</sup> Constitutional History of the United States as Seen in Development of American Law, 72-80.

<sup>3</sup> See 1 American Law Review, 439.

<sup>4</sup> Mr. Rawle's Address, 112 U. S., Appendix, 756. [See *post*, Vol. III, 408.]



one of these instances occurred five years subsequently to the decision in *Marbury v. Madison*.<sup>1</sup> It is true that in both cases the impeachment proceedings failed to effect a removal; but in one of the cases the Legislature refused to re-elect the offending judges when their terms expired at the end of the year. So late as 1822, when a Kentucky judge had declared a State statute unconstitutional, an attempt was made to have him removed by the Governor upon a resolution of the Legislature. The proposition received a large majority in the House, but failed for want of the requisite two-thirds vote.<sup>2</sup> Two years later, in 1824, an attempt was made in the Kentucky Legislature to remove all the judges of the Court of Appeals because they had held certain statutes unconstitutional. When the attempt to remove failed to obtain a two-thirds vote, the Legislature resorted to the expedient of passing an act purporting to abolish the existing court and to establish a new court; a proceeding which kept the State in a turmoil until 1826, when the people elected a Legislature which sustained the old court.<sup>3</sup>

Nor is it necessary to go back three generations to show how the exercise of this power is likely to be regarded by the multitude. It is true to-day that many citizens feel that the judges are usurping legislative power when they treat an act of the Legislature as void because it conflicts with the Constitution. It seems impossible to make some people understand that the Legislature for the time being does not possess unlimited power. "I am the State," was the declaration of the French monarch. "We are the

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<sup>1</sup> Cooley's Constitutional Limitations, 160, note 1.

<sup>2</sup> Sumner's Life of Jackson, 125.

<sup>3</sup> 2 Kentucky Law Journal, 71-80; Sumner's Life of Jackson, 126, 127, 132-134.

State," is the unuttered belief of some members of the Legislature. They would indorse the argument made in the Ohio impeachment case — that the action of the court was "an assault upon the supremacy of the Legislature." It has not occurred to such persons that the Constitution emanated from the people, and not from the court. Their claim, reduced into plain English, is, "that the representatives of the people are superior to the people themselves." Chief Justice Lawrence of Illinois rightly said: "Whatever respect may be due to the Legislature, that due to the Constitution is still greater."<sup>1</sup> It could be wished that every newly-elected member of the Legislature would read the passages already referred to in Marshall's opinion; and also go down to the town clerk's office, call for the first volume of the New Hampshire Reports, and read page 201 (a part of Judge Woodbury's opinion in *Merrill v. Sherburne*).

I desire to speak within bounds; but I firmly believe that if Marshall and his colleagues had failed to deal rightly with this question in A. D. 1803, none of their successors would have done so in later years. The power of the court to treat unconstitutional laws as nullities would have been of no more account than the veto power of the British crown now is, and the Constitution itself would not be worth the parchment upon which it is engrossed. We might in that case well have prefixed to this outwardly imposing instrument the motto: "*Stat nominis umbra*."

We may as well notice here the charge that Marshall carried out on the bench the theories which he had previously entertained as a political partisan. No doubt he

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<sup>1</sup> 45 Illinois, 419.

held, at the date of his appointment, very strong views as to the construction and enforcement of the Constitution. But there was no reason why he should not, as a judge, act upon the views which he sincerely entertained, and which he subsequently saw no cause to depart from. It would have been impossible for either President Adams or President Jefferson to find in the whole country a single lawyer, competent for the Supreme bench, who had not formed and expressed an opinion on these matters. This class of questions had just been thoroughly discussed in the debates upon the adoption of the Constitution. The nation had decided to try the experiment of a written constitution. With a view to the success of that experiment, it was obviously desirable that the construction of the instrument should be intrusted to those who favored its adoption, rather than to its opponents.

In this connection it should be stated that Marshall, although a Federalist, was not willing to go all lengths with the most zealous members of that faction. In 1798 he wrote a letter to a newspaper, expressing an unfavorable opinion of the pet Federal legislation known as the Alien and Sedition laws.<sup>1</sup> In consequence of this communication, one of the party leaders, Fisher Ames, went so far as to deny the soundness of Marshall's Federalism.<sup>2</sup>

Among the vexed questions remaining to be decided was one second in importance only to that discussed in *Marbury v. Madison*. By the latter decision it was settled that a statute conflicting with the United States Constitution would be treated as a nullity in any litigation

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<sup>1</sup> See copy of letter in *The Columbian Centinel* of October 20, 1798.

<sup>2</sup> *Life and Works of Fisher Ames*, 246. The writer is indebted to a friend for calling his attention to the criticism of Ames.

which originated in the United States courts. But how if the question were first raised in a State court, and the State court should happen to decide, either that the statute was constitutional, or that the court would not treat even an unconstitutional statute as a nullity? Could the United States Supreme Court take jurisdiction upon a writ of error, and effectually reverse the judgment of the State court? This question was passed upon in the United States Supreme Court, in 1821, in the well-known case of *Cohens v. Virginia*; <sup>1</sup> and was rightly decided in favor of the jurisdiction of the United States court. One of the most effective passages in Marshall's opinion is that on page 377, where he states the practical results of the opposite view as advocated at the bar. He suggests that one result would be that the United States Constitution would be liable to receive "as many constructions as there are States."

But the legal perils of the republic were not ended by the decisions in *Marbury v. Madison*, and *Cohens v. Virginia*. Another vital question was left to be grappled with, and it is one which has been continually recurring ever since: in what spirit and upon what principles shall the Constitution be interpreted? There were then, and there still are, persons who would construe the Constitution in the same hostile spirit which courts are wont to exhibit in regard to pleas in abatement: every intendment to be made against it and none in its favor. To this school of narrow constructionists, Marshall did not belong. Such men, he said, would "explain away the Constitution of our country, and leave it a magnificent

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<sup>1</sup> 6 Wheaton, 264.

structure, indeed, to look at, but totally unfit for use;" or, as he once expressed it, "a splendid bauble."

His guiding principles of constitutional interpretation may be summed up in two familiar legal maxims. He proposed to construe the instrument, *ut res magis valeat quam pereat*. And he proposed, in construing the words, to take into account the subject-matter of the instrument. He believed that, in order to ascertain the meaning of a writing, we must look not only at the words, but also look at the object of such words relating to such a matter. The question is not, what might these words signify if used in some other connection, but rather, what is the intention which these words express when used in such an instrument for such a purpose.

As to the nature of the instrument he was not misled by false analogies. He knew that the so-called "rules" of construction applicable to contracts between individuals, to wills, or even to ordinary legislative enactments, were not necessarily and always applicable to a constitution, an instrument *sui generis*. "We must never forget," he once said, "that it is a constitution that we are expounding." (4 Wheaton, 607.) "This provision is made in a constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs." (4 Wheaton, 415.) And on another occasion he said: "A constitution is framed for ages to come and is designed to approach immortality as nearly as human institutions can approach it." (6 Wheaton, 387.)

He realized the distinction between a constitution and a code of laws. He believed that the Constitution was not intended to contain "an accurate detail of all the subdivisions of which its great powers will admit," or of

"all the means by which they may be carried into execution." In his view the very nature of the instrument required (and its framers so intended) "that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." Hence he derived the doctrine that Congress has implied power to enact appropriate legislation to carry out the objects aimed at by the Constitution. "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." (4 Wheaton, 421.)

Again, unlike some modern judges, Marshall did not refuse to declare a statute unconstitutional merely because the Constitution did not contain, in express words, a specific prohibition of the particular legislation in question. In the great case of McCulloch v. Maryland, in sustaining the claim of the United States Bank that it was exempt from the power of a State to tax its operations, he said: "There is no express provision for the case; but the claim has been sustained on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web or blended with its texture, as to be incapable of being separated from it without rending it into shreds." (4 Wheaton, 426.)

There is time to make specific reference to only very few of Marshall's decisions on constitutional points. A complete list of all his decisions on constitutional questions may be found in the appendix to an excellent essay by Mr. Henry Hitchcock, of St. Louis, one of the most

eminent lawyers of the Middle West. The essay is entitled "Constitutional Development in the United States as Influenced by Chief Justice Marshall;" and it contains able comments upon some of the leading decisions. It is published together with articles by other writers in a book whose title is "Constitutional History of the United States as seen in the Development of American Law."

Two specific objections as to the methods and results of Marshall's interpretation deserve particular notice.

It may be said that the court has held constitutional provisions applicable to modes of business and methods of life which were unknown at the time of adopting the Constitution. Hence, it may be argued, these matters could not have been in the minds of the framers, and it cannot properly be said that they intended the Constitution to apply to such cases. Let us test the practical working of this argument, by applying it to a concrete case. The Constitution gives Congress the power to regulate "commerce." The only method of commerce by navigation known in 1787 was that carried on by sailing vessels and canal boats. The members of the convention had never heard of such a thing as a vessel propelled by steam. Can it, therefore, be successfully contended that the Constitution was intended to give power to regulate commerce by water only when carried on in sailing vessels or canal boats, and that no power exists to regulate commerce carried on by steamboats? This contention is based on an entire misconception of the nature and purpose of a constitution. Such an instrument is not intended to contain a multitude of specific rules, providing in minute detail for its application to all possible situa-

tions, present or future. It lays down broad general principles which are intended to be applied not only to the present conditions, but also to all new conditions arising out of changes in the methods of life. "Many cases," says Mr. Machen, "which were not and could not have been specifically in the minds of the framers were really covered by their general concepts, and are, therefore, in a true sense, included within their actual intention." Under the word "commerce" they intended to include "all conceivable means—whether at that time known or unknown—by which commodities might be bought, sold, and exchanged."<sup>1</sup>

The point is put with great force by Mr. Justice Brewer in the Debs Case, 158 United States Reports, 564, 591 (A. D. 1895), when asserting the power of Congress to control commerce carried on by railroads. "Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal boats and sailing vessels, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the National Government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

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<sup>1</sup> 14 Harvard Law Review, 212.



But there is a more serious complaint.

It is said that Marshall sometimes construed a constitutional provision in a sense exactly contrary to the intention and understanding of the framers, as evidenced by their practical construction for many years after the adoption of the Constitution.

My answer to this complaint is a demurrer.

The practical construction or the distinctly expressed contemporaneous opinion of the framers cannot be allowed to control their own language in the Constitution itself, when such language is explicit and unambiguous. Of course, nobody denies that, in a case where the meaning of the language is open to serious doubt, the contemporaneous construction of the framers is entitled to be considered, and its evidentiary weight may sometimes turn the scale. But not so when the language is clear. Then we must apply the general rule, that the statesmen who framed the Constitution and the people who adopted it "must be understood to have employed words in their natural sense, and to have intended what they have said."<sup>1</sup>

One of the strongest illustrations of this principle is afforded by a case decided by the Supreme Court of New Hampshire, in reference to the meaning of a clause in the State Constitution. The New Hampshire Constitution, which took effect in 1784, provides that,— "In the government of the State, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from and independent of each other, as the nature of a free government will admit. . . ." (Bill of Rights, Article 37.) Looking only at the plain language of this article, no man would say that

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<sup>1</sup> Marshall, C. J., 9 Wheaton, 188.

the Legislature could grant a new trial of a case in court, any more than the court could enact a statute. Yet, for thirty-three years after the adoption of this constitutional provision, successive Legislatures (every one of which probably contained some members who were also members of the Constitutional Convention in 1784 or in 1792) assumed the power of granting new trials. The validity of such legislation was occasionally questioned; and the earlier (unreported) decisions of the court are understood to have been contradictory, sometimes sustaining and sometimes disallowing such statutes. But the Legislature persisted in the custom of passing such acts. At last, in 1818, the question was fully considered by the court, and a result reached which has ever since been adhered to. The three judges of that court (and an excellent court it was) were all Jeffersonian Democrats, recently appointed by Governor Plumer after the Federalists had been finally and forever ousted from power in the State.

How did Richardson, Bell, and Woodbury decide? Did they say that the long usage of the Legislature to grant new trials afforded conclusive evidence of the meaning of the Constitution, and controlled the plain language of that instrument? On the contrary, they held (in a masterly opinion by Judge Woodbury) that the act of the Legislature was an attempted exercise of judicial power, and therefore unconstitutional; and they explicitly said: "Nor could it be pretended on any sound principles, that the usage to pass them, if uninterrupted for the last twenty-seven years, would amount to a justification, provided both the letter and the spirit of the written charter of our liberties forbid them."<sup>1</sup>

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<sup>1</sup> Merrill v. Sherburne, 1 N. H. 199, p. 217.

The same doctrine has been reiterated and further illustrated in more recent decisions of the New Hampshire court. Thus Judge Doe, in 54 N. H., p. 634, says that the legal meaning of the Constitution is "not to be ascertained by summoning the thousands who voted for it to testify what they understood its effect would be. Constitutional rights have a better foundation than hearsay and parol evidence."

We, of the present generation, are not concerned to assert that Marshall was always right, or that he has spoken the last word on each and every subject which he discussed. Probably his worst mistake, according to our modern notions, is to be found in his dissenting opinion in *Bank of United States v. Dandridge*,<sup>1</sup> where he contended that a corporation can act only by writing. He said, and said truly, that the impersonal entity (the "legal person") has no voice (*i. e.*, no mouth or tongue) with which to speak. Hence he concluded that its will must be communicated solely in writing. He overlooked the fact that the impersonal entity has no hand with which to write, any more than it has a tongue with which to speak. His view, carried out to its logical conclusion, would debar corporations from transacting any business whatever. Indeed, it would prevent the initial step of organizing the corporation.

Of all Marshall's decisions, the one most frequently doubted in this State is that in the Dartmouth College case. No lawyer likes to be compelled to choose between the conflicting views of two such jurists as Richardson and Marshall. It seems presumptuous to differ from either; still more so to differ from both. And yet I, for one, am inclined to say that *both* these great judges were

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<sup>1</sup> 13 Wheaton, 64, pp. 91-94, 97, 103.

wrong; that while each was right on some points, yet each was wrong on other points; that Richardson erred when he held that the amendatory statutes were *not* in violation of the Constitution of New Hampshire; and that Marshall erred when he held that these statutes *were* in violation of the Constitution of the United States. In other words, I incline to indorse the views on this subject expressed by Judge Doe in his opinion in *Dow v. Northern R. R.*, 67 N. H. 1, pp. 27-53 (also printed, in substance, in 6 *Harvard Law Review*, 161 and 213, under the title "A New View of the Dartmouth College Case"). Judge Doe thinks that the State had power to revoke the charter, but had not power to take control of the corporate property. He believes that the State's attempt to control the management of the trust funds is in conflict with the provisions of the State Constitution relative to deprivation of property, immunities, and privileges. So far as the State Constitution is concerned, there appears to be no satisfactory answer to the powerful argument of Mr. Mason, which is fully reported in the reprint of the Dartmouth College case in 65 N. H. 473-497. To avoid misapprehension, it should be added that the only clause in the United States Constitution which was then under discussion is the prohibition against the passage of laws impairing the obligation of contracts. The case was decided long before the adoption of the Fourteenth Amendment. The reasoning of both Mr. Mason and Judge Doe clearly demonstrates that the New Hampshire Statutes of 1816, if enacted to-day, would be in violation of that amendment. And it should further be said that the reasoning in Marshall's opinion tends irresistibly to the same conclusion. His opinion is very strong to the point that the trustees of the college have a *locus standi* in court to

question the validity of the amendatory statutes; and also to the point that the amendments have the effect of totally changing the system of managing the corporate affairs, substituting the will of the State for the will of the donor. His error, if error there was, is in the assertion that the grant of a corporate charter involves a contract on the part of the State, within the meaning of the above-quoted clause of the United States Constitution.

That Marshall made occasional mistakes may be safely admitted without seriously detracting from his judicial reputation. After making all reasonable allowance for errors, the fact remains that these errors are very few in proportion to the whole number of his decisions. We doubt whether, in any department of human effort, another modern instance can be found of one who had to travel over a new country, blazing his path through an hitherto unexplored forest, and yet lost his way so seldom or left behind him so few erroneous guideposts to mislead posterity.

Since the Civil War the trend of public opinion has been in favor of centralization, and of what may be termed "nationality." Indeed, some thoughtful persons have now, for many years, believed that one of the future dangers of the republic consists in the tendency to unduly enlarge the sphere and the power of the central government. But in the period between the election of Washington and the inauguration of Lincoln, the drift was in the contrary direction. In those years it was often an unpopular thing to contend that the central government should be allowed to fill its proper sphere, and exercise its proper powers. The men who then stood in the gap, and battled for views now generally recognized as correct, are to-day regarded as public benefactors.

Of all the persons, besides Washington, who were prominent anywhere in the years from 1789 to 1861, there are three who stand out pre-eminent as promoters of the strength and durability of the National Government. They are Hamilton, Webster, and Marshall. I would not detract one iota from the praise due to Hamilton's constructive and far-seeing statesmanship. Nor would I belittle the stately eloquence and powerful logic of Webster's anti-nullification speeches. But I believe that the unity of the Nation, in other words "American nationality," was advanced more by the decisions of Marshall than by the combined efforts of Hamilton and Webster. Had it not been for Marshall's work, the Union could hardly have withstood the strain of the Civil War.

You will notice that, in speaking of Marshall's judicial labors, I am confining myself almost wholly to his decisions on constitutional questions. His opinions on other branches of jurisprudence take very high rank. But the limits of the present occasion do not permit a survey of them. Nor can I pause here to discuss Marshall's characteristics as a *nisi prius* judge; or, to describe the historic trial of Aaron Burr, at which he presided, holding the scales of justice "with absolutely even hand."<sup>1</sup>

A few words may, however, be said in regard to his relations with his colleagues on the Supreme bench. It is not uncommon to speak of the court as though it were composed of Marshall alone. In fact, he had divers able and efficient co-laborers, and he himself would have been the last man to disparage the value of their assistance. His prominence in the public mind is due, not merely to the

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<sup>1</sup> See Mr. Rawle's comments on the Burr trial in his address printed in 112 U. S., Appendix, 758-759. [See *post*, Vol. III, 408.]

general opinion that he was intrinsically the ablest of the judges, but also to the fact that he acted as the mouth-piece of the court in a very large proportion of cases. According to Mr. Hitchcock's figures, Marshall, during his thirty-four years of service, delivered the opinion of the court in nearly half of all the cases decided, and delivered the opinion in more than half of the cases upon questions of constitutional law. Undoubtedly the Chief Justice was a great power in the consultation room, and had immense influence over his associates. But that influence was due to force of intellect and character; not to obstinacy, nor to a disposition to treat a difference of legal opinion as a matter of personal offense. To the extent of his influence, both friends and foes can be summoned to testify. In 1810, Jefferson, writing to President Madison advocating the appointment of Tyler to the Supreme Court in case an expected vacancy should occur, said: "It will be difficult to find a character of firmness enough to preserve his independence on the same bench with Marshall."<sup>1</sup> Jefferson believed, as the same letter shows, that Marshall's influence was due to cunning and sophistry. This theory seems to me effectually disproved by the relation which Judge Story for more than twenty years sustained to his chief. Story went upon the bench an ardent young disciple of Democracy. He soon became an enthusiastic admirer of Marshall, concurred in most of his constitutional opinions, and loved him with devoted affection. Could a man of Story's intellect have been systematically deceived for twenty-three years by "cunning and sophistry?" The answer is not doubtful. It was the intrinsic merit of Marshall,

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<sup>1</sup> Ford's Edition of the Writings of Jefferson, vol. ix, p. 275.

both intellectually and morally, which accounts for his influence over his gifted associate.

Marshall's judicial style, as it appears in his constitutional opinions, we may well describe in the words recently used by Herbert Paul in reference to Dean Swift. "Absolute and utter simplicity," is its distinguishing mark. It leaves the reader "face to face with the precise idea which the writer wished to convey." During the long years since those opinions were first reported, there have been occasional discussions as to whether his views were correct, but there has seldom, if ever, been any doubt as to what his views actually were. In those opinions we find no needless display of learning, no collateral digressions, no talking for momentary effect, and no attempts at fine writing. Indeed, there is an entire absence of the defects which so often mar judicial opinions. In him there is no "frequency of flat, unnecessary epithets," nor the "folly of using old threadbare phrases," nor are his opinions made up of poorly-arranged quotations from other men, constituting what has aptly been termed "a manifest incoherent piece of patchwork." Above all, there is no "irrelevant eloquence." His motto was said to be: "Aim exclusively at strength." And in this connection it should be noticed that there is seldom any flaw in his logical processes. If his premises are once admitted, his conclusion generally follows beyond all question. Of the effect of Marshall's moral qualities upon his style, I shall speak later.

The Chief Justice was not what would be called "a great book lawyer." While he had a fair knowledge of the books, yet his strongest intellectual points were his intuitive perception of justice, his wonderful power of analysis, and his



faculty of close and logical reasoning. "Probably," says Professor Parsons, "the decisions of no [other] eminent judge have so few citations of authorities." . . . "It used to be said of him that, when he had formed his conclusions, he would say to his colleague, 'There, Story, is the law; now you must find the authorities.'" . . . Story himself said: "When I examine a question, I go from headland to headland, from case to case; Marshall has a compass, puts out to sea, and goes directly to his result."<sup>1</sup>

It is natural for us to compare Marshall's judicial style and tone with that of some of our New Hampshire judges. One finds in him the crystal-like clearness of Samuel D. Bell, the nervous English of Ira Perley, the sledge-hammer force of Joel Parker, the weighty judicial tone of William S. Ladd, the incisive legal reasoning of Alonzo P. Carpenter, and the originality of thought and statement which so strongly characterized Charles Doe. But if I had to select the New Hampshire judge whose style and whose matter, take it all in all, most resembles that of Marshall, I should be inclined to name none of these, but rather to name his contemporary, Chief Justice Richardson.

If we seek a wider field of comparison, taking in the whole country and looking at statesmen as well as jurists, we shall find strong points of resemblance between Marshall and Lincoln. Both have the same faculty of "embalming in one short, happy phrase" an important principle; both go directly to the point; both are remarkable for their power of clearly stating the issue and working out a *reductio ad absurdum* of the opposing view. Cardinal Newman has said: "Half the controver-

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<sup>1</sup> 1 American Law Review, 438.

sies in the world are verbal ones, and could they be brought to a plain issue, they would be brought to a prompt termination. . . . When men understand what each other mean, they see, for the most part, that controversy is either superfluous or hopeless." Marshall and Lincoln had each the happy power of stating their own views so as to make their meaning unmistakable, and they also had the power to analyze their opponent's statement and reduce it to its lowest terms, showing exactly what it amounted to, and what its practical effect would be. A reply to their statements was generally a hopeless task.

Years ago the Supreme Court of New Hampshire had announced the result arrived at in a case of great public interest, but their reasons had not yet been written out for publication in the reports. In this stage of the matter, one of the judges was conversing with a legal friend as to the manner in which the views of the court should be presented. His friend advised him to "write an opinion which the selectmen could understand." Marshall never needed such advice. "His opinions," says Mr. Hillard, "are remarkable for addressing themselves rather to the common than to the legal mind, . . . and, as a general rule, they can be followed and understood by any strong-minded man, whether in the profession or not."<sup>1</sup> To borrow again from Herbert Paul, we may say of Marshall: "There were very few things which he could not understand, and whatever he could understand he could explain to the humblest capacity."

In what has been said of Marshall's judicial style I wish to be understood as using the expression "style" in a larger sense than is sometimes attached to it. I mean something more than the selection of words or the fram-

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<sup>1</sup> 42 North American Review, 227.

ing of sentences. I mean to include "the entire scheme" of the opinion, "the proportion of the several parts to the whole and to each other." No writing can approach perfection unless the author has "the sense of proportion, which the Greeks called by an expressive term, 'the art of measuring.'" This is to be found in Marshall. The space given to each topic is in proper ratio to its importance, and the arrangement is such that each topic is discussed in its proper place and discussed only once.

But over and above all manifestations of intellectual ability the opinions of Marshall evince a far higher characteristic, that of intellectual honesty; or, as Martineau puts it in reference to John Stuart Mill, "intellectual conscientiousness." There are no evasions of difficulties. Every point raised by counsel on the losing side is taken up and fully discussed. The workings of the mind of the great Chief Justice are laid bare. As was said of a great writer: "There is no veil, however thin, between the mind of the author and the mind of the public." There is not only great intellectual power, but also "absolute transparency of intellect."

And this brings us to what is, after all, the great distinguishing feature in Marshall's life; the real secret of his extraordinary success fully as much as his great intellect. And that is his high personal character. There was a man behind the magistrate. John Marshall was pre-eminently single minded. His whole life was pervaded by an overpowering sense of duty and by strong religious principle. A firm believer in the Christian religion, his life was in accord with his belief. The distinguishing trait of his life and character was one which has been attributed to two of the recent heads of the

English judiciary. At the proceedings in court in memory of Lord Chief Justice Russell, the Attorney-General, Sir Robert B. Finlay, said of the late Chief Justice: "He was simple with the simplicity of a great and kindly nature." A few years earlier, Tennyson was reading aloud to some friends his "Ode on the Death of the Duke of Wellington." After pronouncing the lines—

"And, as the greatest only are,  
In his simplicity sublime"—

the poet paused, and said there was one man only in the present time to whom these lines applied. The man thus singled out by Tennyson as sublime in his simplicity was the former Lord Chancellor of England, Roundell Palmer, Earl of Selborne. So we may truly say of our own great Chief Justice that his most marked characteristic was simplicity, using that term in its highest and best sense.

It is, I believe, largely to this trait of simplicity of mind and heart that we owe the charm and the effect of Marshall's judicial style.

If you will look at Dean Swift's "Letter to a Young Clergyman" (which ought to be made a subject of study in all theological seminaries), you will find that that great master of the English tongue affirms that faults in style are, nine times out of ten, owing to affectation rather than to want of understanding. When men depart from the rule of using the proper word in the proper place, it is usually done in order "to show their learning, their oratory, their politeness, or their knowledge of the world." "In short," says the Dean, "that simplicity, without which no human performance can arrive to any great perfection, is nowhere more eminently useful than in this." So a great modern preacher (James Martineau) says: ". . . the excessive eagerness about reputation

produces a thousand pitiable distortions of understanding. In one it takes the shape of a determination to be original [which, I suppose, never befell any man by deliberate resolve]. . . . In another it passes into an opposite folly—the pride of being peculiarly moderate and sound. . . .”

I defy anyone to find traces of these failings in the opinions of John Marshall.

But some one may say: “You are pronouncing an unqualified eulogy; you are describing an absolutely perfect character. Are you not falling into the common error of biographers, that of making an idol of their subject?” Such a questioner may incline to agree with the late Master of Balliol, who said: A man’s friends “always think it necessary . . . to tell lies about him; they leave out all his faults lest the public should exaggerate them. But we want to know his faults—that is probably the most interesting part of him.”<sup>1</sup>

Most people believe in the old proverb: “There never was yet a very great man without some very great folly annexed to him.” But the late Professor Parsons said: “This is true of all the men I have ever known, except Chief Justice Marshall. . . .”<sup>2</sup> It is certain that Marshall’s faults, if he had any, are hard to discover. Suppose, however, that one were compelled to serve as the Devil’s Advocate, whose official duty it is to urge objections to the proposed canonization of a deceased person. Is there any fact which would furnish an argument against putting John Marshall on the list of saints? I can think of but one plausible objection, a mental

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<sup>1</sup> *Life of Jowett*, vol. 2, 276.

<sup>2</sup> *2 Bench and Bar*, 304.

characteristic, which he probably shared in common with almost every public man of his time; and that is failure to do justice to the motives of political opponents. A friend, who has made careful investigation, tells me that he has found no evidence even of this fault. Still I cannot help supposing that it existed. After making, however, all deduction for this defect, it is safe to say that, among all the Federal leaders, there are not to be found three whiter characters than George Washington, John Jay, and John Marshall.

But while the verdict of posterity is overwhelmingly in favor of Marshall, yet it must be frankly admitted that the opinion of his contemporaries was by no means unanimous in his favor. No sketch of his life can be complete which omits to mention the complaints of his critics.

Severe and unjust criticism is the common experience of judges, and there is an especial reason why judges of the United States Supreme Court should be liable to this fate. They frequently have to pass upon matters of public interest, concerning which the people have already taken sides, and upon which partisan passions have been excited. And dissatisfaction is especially likely to be manifested when the members of the court belong to a political party which is opposed to the existing administration. How President Jefferson chafed under the yoke of such a court is apparent from his letters. In December, 1801, he said of the Federalists: "They have retired into the Judiciary as a stronghold. . . . There the remains of Federalism are to be preserved and fed from the Treasury, and from that battery all the works of republicanism are to be beaten down and destroyed."<sup>1</sup>

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<sup>1</sup> Henry Adams' *History of the United States*, 257.

Again, in 1807, he said: "And it is unfortunate that Federalism is still predominant in our judiciary department, which is consequently in opposition to the legislative and executive branches, and is able to baffle their measures often."

But, over and above these causes, there was another reason why political animosity was manifested against Marshall, and that reason was his authorship of the "Life of Washington." It was impossible to write this Life without discussing the causes that led, during Washington's administration, to the formation of political parties and divided the people into Federalists and Democrats. It was also impossible for a personal friend and political sympathizer to write an account of Washington's administration without reflecting on the conduct of those members of the Democratic party who practically constituted the opposition. And it was equally impossible that history could be written from such a standpoint without giving great offense to leading Democrats. Jefferson spoke of the work as "the five-volumed libel;" "the party diatribe of Marshall." Nor did Jefferson stop here. His hostility to Marshall antedated the latter's appointment to the bench. So early as 1795 he speaks of Marshall's "profound hypocrisy." During Marshall's judicial career Jefferson used language which seems to question his honesty. In 1810 he speaks of "the ravenous hatred which Marshall bears to the government of his country," and "the cunning and sophistry within which he is able to enshroud himself." Jefferson also says: "His [Marshall's] twistifications in the case of Marbury, in that of Burr, and the late Yazoo case shew how dexterously he can reconcile law to his personal

biases. . . ."<sup>1</sup> In a letter to Gallatin, he speaks of the "gloomy malignity" of Marshall's mind.<sup>2</sup> A letter to William B. Giles, in reference to the Burr case, contains more specific complaints. In that letter Jefferson alludes to "the tricks of the judges to force trials before it is possible to collect the evidence. . . ." He also says: "The presiding judge meant only to throw dust in the eyes of his audience." And he sarcastically adds that "all the principles of law are to be perverted which would bear on the favorite offenders who endeavor to overrun this odious Republic."<sup>3</sup>

The Democratic partisans did not content themselves with growling. Some of them went so far as to propose measures looking towards the removal of objectionable judges and the curtailment of the power of the court. The remedy first suggested was impeachment; and some very broad views were advanced as to what would constitute sufficient grounds for removal in such a proceeding. At the time of the trial of Judge Chase, Giles of Virginia, one of the administration leaders in the Senate, contended that a judge might be removed on impeachment, "though guilty of no crime, for mere error in judgment, or because he differed in political opinion from the President or from Congress."<sup>4</sup> But the acquittal of Judge Chase induced a general belief that impeachment was not an efficient remedy to rid the country of an unpopular judge. Thereafter, though impeachment was occasionally threatened,<sup>5</sup>

<sup>1</sup> Ford's Edition of the Writings of Thomas Jefferson, vol. ix, 41; x, 247; ix, 527; vii, 38; ix, 275, 276.

<sup>2</sup> 1 Henry Adams' History of the United States, 194.

<sup>3</sup> Forman's Life and Writings of Jefferson, 110.

<sup>4</sup> Life of William Plumer, 274, 320, 321.

<sup>5</sup> Life of William Plumer, 325; 3 Henry Adams' History of the United States, 340, 406, 470; 4 Ibid., 105, 156.



the main efforts of the opponents of the court were directed towards other methods of attack.<sup>1</sup> Soon after the Burr trial, in 1807-1808, motions were made in each branch of Congress to amend the Constitution, so that all judges of the United States should hold office for a term of years, and should be removed by the President on address by two thirds of both Houses. This proposition, though not successful in Congress, was supported by the action taken in the Legislatures of Pennsylvania and Vermont; as well as by the action of the House of Delegates in Virginia and of one branch of the Legislature of Tennessee.<sup>1</sup> In 1822, soon after the decision in *Cohens v. Virginia*, Richard M. Johnson, of Kentucky, proposed in Congress an amendment to the United States Constitution, giving appellate jurisdiction to the Senate in any case to which a State was a party, arising under the laws, treaties, etc., of the United States.<sup>2</sup> In 1830 an attempt was made to repeal the twenty-fifth section of the judiciary act, which gives the Supreme Court, in certain cases, appellate jurisdiction in reference to the State courts. The proposal was defeated; but among the minority were some of the leading supporters of the Jackson administration. In 1831 it was proposed to change the tenure of Federal judges from life appointments to terms of years. Although the attempt failed, it had sixty-one supporters in the House.<sup>3</sup> Reference may also be made here to the reported disinclination of President Jackson to sustain the decree of the United States Supreme Court as against the defiance of the State of Georgia. The conflict was inci-

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<sup>1</sup> 4 Henry Adams' *History of the United States*, 205, 207; 3 Randall's *Life of Jefferson*, 247, note 1.

<sup>2</sup> Sumner's *Life of Jackson*, 128; 1 Webster's *Private Correspondence*, 320.

<sup>3</sup> Sumner's *Life of Jackson*, 173.

dent to the attempt of Georgia to acquire the lands within its limits occupied by Indian tribes. The President undoubtedly sympathized strongly with the wishes of Georgia that the Indians might be removed; and it is perhaps to this sympathy, rather than to partisan prejudice against Marshall, that we should attribute his reputed unwillingness to sustain the court. The conduct of Georgia was certainly in flagrant defiance of the United States Constitution and laws. Certain persons were convicted and imprisoned under a statute of Georgia. Upon a writ of error, the United States Supreme Court held that the State statute was unconstitutional, and ordered that the men then imprisoned should be released.<sup>1</sup> Georgia did not obey; and it was believed that President Jackson would decline to take any executive action to enforce the decision of the United States court. The men finally obtained their release by making terms with the State of Georgia. It was rumored that General Jackson said: "John Marshall has made his decision. Now let him enforce it."<sup>2</sup>

Looked at to-day in the calm light of history, all the complaints and movements against Marshall appear simply ridiculous, and do no hurt to his memory. If the great Chief Justice had ever taken the trouble to allude to the occasional evidences of his unpopularity, he might well have expressed himself in the words which Lord Mansfield used when laboring under the load of popular displeasure: "*Ego hoc animo semper fui ut invidiam virtute partam, gloriam, non invidiam, putarem.*"

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<sup>1</sup> Worcester v. State of Georgia, 6 Peters, 515.

<sup>2</sup> Von Holst, Constitutional History of the United States, 454-458; Sumner's Life of Jackson, 182; 2 Kennedy's Life of Wirt, 370-373; 1 Bryce, American Commonwealth, 262; Constitutional History of the United States as seen in the Development of American Law, 102.

But we must do justice, not only to Marshall, but also to his opponents. Absurdly mistaken though these men were, yet they were neither unpatriotic nor dishonest. Their attacks simply illustrate the extent to which political partisanship can cloud the reason and overturn the judgment of men of good intentions and strong intellect. Horace Mann, writing to a distinguished subject of Queen Victoria, said, "Party allegiance here has much the effect of loyalty with you. It has the power to change the nature of right and wrong." This is not the proper place to discuss the relative merits of the Federal and Democratic parties in the early days. Most candid students of history will probably say that neither party was wholly right nor wholly wrong. "Venomous" is hardly too strong a word to describe the political feeling in those times. The leaders on each side were absolutely unable to do justice to the motives of their opponents. It would not be difficult to cull from the writings of leading Federalists criticisms of Jefferson fully as offensive as any of the expressions which Jefferson used about Marshall.<sup>1</sup> Indeed, Marshall himself, in a letter to Hamilton, expressed a very unfavorable opinion of Jefferson's morals.<sup>2</sup> True it is, that the leaders on both sides need to have the mantle of charity thrown over the vehemence of their language. When a man, acting up to his lights, gives utterance to error, his sincerity does not verify his statement, but it does save the character of the speaker.

One is glad to turn away from the party animosities,

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<sup>1</sup> See, for instance, the views expressed by Timothy Pickering; 4 Henry Adams' *History of the United States*, 347, 359; Lodge's *Studies in History*, 205, 208.

<sup>2</sup> Vol. vi, Hamilton's Works, 502.

and contemplate the personality and the domestic life of the Chief Justice.

The physical feature in Marshall which most impressed an observer was the brightness of his eyes. He could "gaze long and intently without winking." He was wont to listen to arguments with the most profound attention. In those days there was no time limit imposed upon counsel, and occasionally a man would speak, not merely for hours, but for a whole day, or even longer. In a case from the district of New Hampshire, argued in 1795 at Philadelphia, five counsel occupied ten days.<sup>1</sup> But the steady and persistent gaze of the Chief Justice had sometimes the effect of shortening an argument. One counselor, who had probably cut his speech short, said that no man could stand the steady look of that clear eye for more than two hours.

Like most truly great men, Marshall had a hearty laugh and a strong sense of humor. He was one of the most companionable of mortals. In a book published in Virginia not many years since, there is a delightful description of Marshall, when in the height of his reputation, participating in the recreations of the Barbecue Club. This was an association composed of the prominent men of Richmond, and one of its favorite amusements consisted in pitching quoits. On one occasion, after Marshall's quoit encircled the stake or "meg," another quoit thrown by a clerical gentleman alighted on top of the first one. Thereupon the club, as a mock court, listened to jocular arguments on the solemn question: "Who is winner when two adversary quoits are on the meg at the same time?" Marshall cited, in his own behalf, the maxim, *Cujus est solum ejus est usque ad*

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<sup>1</sup> 3 Dallas, 54.

*coelum*. He argued that, as he was the first occupant, his right extended from the ground up to the vault of heaven, and that no one had a right to become a squatter on his back. The club finally decided that it was a drawn throw between the Chief Justice and Parson Blair.<sup>1</sup>

According to all accounts, the domestic life of Marshall was charming. He did not wait to become a wealthy man before contracting matrimony. He was married about two years after he began to practice law, and has been heard to say that, after paying the wedding fee to the parson, he had but one solitary guinea left. Mrs. Marshall soon became an invalid, but her infirmities "only seemed to increase his care and tenderness."<sup>2</sup> Miss Martineau tells us that the Chief Justice believed that women were intellectually the equals of men, and that he had a deep sense of their social injuries. To his wife's memory he paid an unusual honor. It is extremely common to read upon the gravestone of a woman the statement that the deceased was the wife of a certain man. But Marshall was probably the first man to direct that the wife's name should be recorded upon the tombstone of the husband. The inscription, which, with the exception of the last date, he prepared before his death, and which may still be seen on his gravestone in the Shockhoe Hill cemetery in Richmond, reads thus:

"JOHN MARSHALL,  
son of Thomas and Mary Marshall,  
was born on the 24th of September, 1755;  
intermarried with Mary Willis Ambler, the 8d of January, 1783;  
departed this life the 6th of July, 1835."

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<sup>1</sup> "The Two Parsons," by George Wythe Munford, Richmond, 1834: 326-361.

<sup>2</sup> The *Richmond News Illustrated Saturday Magazine*, September 22, 1900.

When, after thirty-four years of judicial service, Chief Justice Marshall died in the eightieth year of his age, the tributes to his memory were numerous and weighty. In some instances, after the sound of the funeral eulogies has died away, the waters close over the memory of a deceased person without leaving a single ripple on the surface. Not so in the case of Marshall. His work has stood the test of time. Year by year his reputation has strengthened and deepened. Nor has that reputation been confined to this country, nor even to this hemisphere. A few years since, when the Chief Justice of South Australia was visiting the United States, an American lawyer called his attention to a portrait of Marshall, saying: "We consider him the greatest judge of our country." "You might well say the greatest judge of any country," was the reply of the distinguished visitor from the Antipodes. In recent times two statues of the Chief Justice have been erected, one at Richmond and the other at Washington. But a still more enduring and imperishable memorial is contained in the pages of Cranch and Wheaton.

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Edgar Aldrich thus introduced his elaborate address on "John Marshall as a Soldier:"

"As the aloe is said to flower only once in a hundred years, so it seems to be but once in a thousand years that nature blossoms into this unrivaled product, and produces such a man as we have here." Such was the poetic simile, employed by a noted English statesman, to illustrate the boundless genius of Homer, and we may well apply it to the stupendous intellectual force of John Marshall. Thomas Carlyle has said: "One comfort is that great men taken up in any way are profitable com-

pany. We cannot look, however imperfectly, upon a great man without gaining something by it. He is the living fountain of life, which it is pleasant to be near. . . . On any terms whatsoever you will not grudge to wander in the neighborhood for a while." And so it is with the memory and life of Marshall.

I am to speak of the early military life of this man of vast proportions. . . .

After reviewing Marshall's career as a soldier of the Revolution the speaker said:

After nearly six years' service, from May, 1775, to January, 1781, with occasional interruptions when hostilities were not active, and with the repulse and discomfiture of Arnold, John Marshall ended his military service, except later as General of Militia, and entered at once upon that great career which was to mean so much for jurisprudence, and for the scope and essential force of the Federal Constitution, of which others are to speak.

Military service is not inglorious. No one will claim that every soldier possesses the qualities of a great judge, but one may possess the qualities of greatness, and do his duty to his country as a soldier in the days of its peril.

Including Mr. Justice Harlan and Mr. Justice White, now in the Supreme Court, thirteen of the line of justices of that court saw military service. They are Harlan, White, Lamar, Matthews, Woods, Campbell, Thomas, Todd, Brockholst Livingston, Alfred Moore, Bushrod Washington, Thomas Johnson, Robert Hanson Harrison, and John Marshall.

Of the Presidents, thirteen of the twenty-four have served their country in war. They are the present executive, William McKinley, Benjamin Harrison, Chester A.

Arthur, who was an officer in the militia before the Civil War, and during the Civil War Adjutant-General and Quartermaster-General of New York, Garfield, Hayes, Grant, Lincoln, Pierce, Taylor, William Henry Harrison, Jackson, Monroe, and Washington.

Marshall, a captain of infantry, was in after life called to preside for many years in the highest court of the republic, where his genius was to develop the underlying principles of the Federal Constitution and erect for its scope the broad and enduring structure of constitutional law, which has held and guided this nation in the great crises of the past, and which shall hold and guide this nation, in her future career of increasing enlightenment and plenitude at home, and in her new and broader sphere of usefulness and power among the nations of the world.

Judge Robert M. Wallace, in the course of his address on "The Associates of John Marshall," said in part:

January 31, 1801, John Marshall was appointed Chief Justice of the United States Supreme Court, taking his seat February 4, 1801. Among the five associates whom he found on the bench was Bushrod Washington, who served with him twenty-eight years. During Marshall's long service of thirty-four years on the bench, ten other associates were at different times appointed, who served with him for longer or shorter periods. Among these last was Joseph Story of Massachusetts, who for twenty-four years was an associate of Marshall. Aside from Washington and Story, ten of his remaining associates had been members of the highest court in their respective States before their appointment, besides holding many other important offices. Of the other three, one had been Secretary of the Treasury, another a United States Senator, and a third a



member of Congress. Many of them had been members of constitutional conventions. They were men of great learning and of the highest character, and added strength to the bench. . . .

The court at this time was surrounded by a most distinguished bar. The period of Marshall's Chief Justiceship might truthfully be called the "Golden Age of the American Bar." The highest talent and ambition were directed to the legal profession in preference to all other, as affording the greatest field for distinction and honor. At that time, great industrial and business enterprises did not, as they do to-day, present to the eyes of the community equal fields for success and preferment with the bar. There was Jeremiah Mason, of whom Rufus Choate said, "As a jurist he would have filled the seat of Marshall as Marshall filled it," and that great constitutional lawyer, Daniel Webster, both sons of New Hampshire, Samuel Dexter of Massachusetts, and William Pinkney of Maryland, whom Judge Story regarded as unequaled advocates, Thomas A. Emmet of New York, who had the real Irish eloquence, the magnetic Henry Clay, the brilliant William Wirt, that great lawyer, Horace Binney, and many others equally illustrious. Their arguments sometimes lasted for days. It was an age of great argument. Their learning, their labors, and their eloquence enlightened and aided the court. The opinions of the court may be said in some degree to reflect the views of these great lawyers. Especially is this true in regard to Webster, whose great learning on constitutional questions expressed to the court in his impressive manner, as for instance in the Dartmouth College case, may be truly said, without any disparagement to the court, to

be reflected in those great constitutional judgments which laid the foundation of our national jurisprudence.

Such were the associates of Marshall on the bench, and such was the bar of that day. It was the duty of the court to develop the judicial system of the National Government under the Constitution. The court, with Chief Justice Marshall at its head, was peculiarly fitted for this great and important task. It is fortunate that this work was committed to those who had the true conception of the functions and powers which the Constitution gave to the National Government, and who had the firmness faithfully to adhere to that conception. It is easy to see that had their ideas on this subject been less correct, or had they faltered in the performance of this great task, the whole scheme of our Government might have been wrecked in its very inception, or its powers might have been so limited and circumscribed by an erroneous interpretation of the Constitution that it would only have been a question of time when it would have succumbed to the encroachment of the States.

The judges who, without precedent or landmark to guide them, settled these great questions, are gone. Judges of later generations have come and gone since then; but the court still remains, a monument to the sagacity of the framers of the Constitution and of the wisdom of its early expounders, and a bulwark of the liberty of the people and of the safety and stability of the Nation. What this court has done for us in the past, in the course of our National development unparalleled in the world's history, we confidently look for it to do for us in the future, as we continue in what we hope and believe will be a still grander and more beneficent National career.

**Exercises at the Annual Dinner February 4, 1901.**

In introducing the exercises at the dinner, Frank S. Streeter thus referred to a scene in the argument of the Dartmouth College case in the Supreme Court of the United States: There is one historic scene in the life of this great Judge to which I wish to refer, because our own college, our own Webster, and our own State were the other dominant figures in the picture. It was enacted in the old Supreme Court room in the basement of the capitol. Chief Justice Marshall presided. On either hand were Justices Bushrod Washington, Johnston, Livingston, Todd, Duvall, and Story. Before these judges stood Webster eloquently pleading for the reversal of the judgment of the Supreme Court of New Hampshire, which had held that, notwithstanding the charter, the State had the power to change the method of its government, and, to a certain extent, divert the use of its funds. The State and the College were in hostile attitudes and the most eminent alumnus was pleading before the greatest Chief Justice who ever sat on the Supreme bench, for the protection of his alma mater against the practical repeal of her charter. We can almost see the orator standing, Jove-like, before the court as he says:

"Sir, you may destroy this little institution; it is weak; it is in your hands! I know it is one of the lesser lights in the literary horizon of our country. You may put it out. But if you do so, you must carry through your work. You must extinguish one after another all those great lights of science which for more than a century have thrown their radiance over our land!

"It is, sir, as I have said, a small college, and yet *there are those who love it*—"

We can almost see him, overcome with his own emotion, his lips quivering, his eyes filled with tears, his voice choking, the orator struggling to gain mastery over himself. We can almost see the great Chief Justice, with his tall, gaunt figure, bending over as if to catch the slightest whisper of the pleader, the deep furrows of his cheek expanded with emotion and his eyes suffused with tears.

It was one of the most dramatic incidents in the whole history of American jurisprudence. It matters not that the judgment then rendered has been worn away and has crumbled under the touch of advancing legal science; it matters not that the State and the College, then in hostile attitudes, have learned to lean on and each appreciate the other, so that now there is diffused among the great mass of our people a feeling of affection for and pride in the old college, and the people are coming to feel that this is their college, that its romantic history and its great charitable work of providing a liberal education for poor boys is truly a part of the general heritage of the State in which every citizen has just pride and has just share. This dramatic scene should not be left to the tender mercies of tradition, but preserved on canvas by the skilled hands of a great artist.

The four parties who bear a dominant part in this historical episode are John Marshall, Daniel Webster, Dartmouth College, and the State of New Hampshire. Marshall and Webster are both gone, but the State and College still live, and may they live long and prosperously.

Governor Jordan, responding for "The State," said in part:

As I sat and listened to Judge Smith, I thought we had the distinction which no other bar in the United States

could boast of. We had here a man addressing us, a distinguished gentleman, a distinguished jurist, a professor of the law, a professor in himself. His story was of the great John Marshall, whose memory we here celebrate; and he was at the same time the son of the great Chief Justice of New Hampshire, Jeremiah Smith, who was born only four years after John Marshall was born, was in the army as was John Marshall, and afterwards, like him, was holding courts and shaping the jurisprudence of the country. His son is addressing us here to-day, and he is only two years older than myself, and he and I are not so old as I hope we both shall be.

When the Constitution — the Federal Constitution — was adopted in our own State, our Jeremiah Smith, who did so much for New Hampshire and for the jurisprudence of New Hampshire, was twenty-nine years old; in 1809 he was Governor of New Hampshire, but I am not here to trace the career of Judge Smith the elder, or Judge Jeremiah Smith the younger. You all know it, and are conversant with their work in New Hampshire, and I say we have a distinction and honor which no other bar association of the forty-five States and our Territories can boast of.

Marshall, with our own immortal Webster, it seems to me, did more than all others to teach our people the length, breadth, height, and depth; the beneficence, the richness, the fullness, the complete adequacy for all time, of the Federal Constitution. The one for thirty-four years spoke from his exalted place on the bench, and is still speaking through his strong opinions,— while the other in House and Senate and elsewhere and almost everywhere unfolded and made plain to the plainest understanding the wealth and utility of its wise provisions,

and the necessity of adhering to them in storm and in sunshine. Each in his own way grandly performed his duty.

President Tucker's response to the toast, "Dartmouth College," gave an account of the origin of that case, stating some facts of interest not generally known. He said: The same year in which Chief Justice Marshall took his seat, Mr. Webster graduated from Dartmouth; seventeen years later, the case of the Trustees of Dartmouth *v.* Woodward was argued before the Supreme Court of the United States, and the decision was rendered in the following February. The college had then been in existence fifty years; the Supreme Court thirty years. I recall these dates that you may see how definitely we are carried back into the formative period of American jurisprudence — certainly into the formative period of constitutional law. If I venture to tell in brief words in your presence the story of this case, you will understand that it is not with the presumption of attempting to add anything to your legal knowledge or even to refresh it, but simply for the purpose of bringing out certain facts with which possibly I may be more familiar than some of you. How did it happen that this college in the wilderness found its way into the Supreme Court of the United States, and, through the decision there rendered, into all the departments of public life — legal, political, and economic? How did it happen that this college of the province of New Hampshire, which drew its existence from the British crown, came to owe its continued existence to the illustrious Virginian whose honor we celebrate here to-night? If I can answer these questions properly, I can show the proper relation of the Dartmouth

College case to John Marshall. The Dartmouth College case grew out of the peculiar, the unique, origin of Dartmouth College. Unlike most of the historic colleges, Dartmouth originated in the consecration, the inexorable faith, the zeal and the courage of one man, Eleazar Wheelock. Harvard grew out of the public sentiment of the Massachusetts colony. The name which it bears represents a most gracious and pleasing personage, according to tradition, but the name of John Harvard lives chiefly as the outcome of tradition. Yale College grew out of the public sentiment of the churches of the New Haven colony. Certain ministers came together and gave out of their scanty libraries enough books to start a college library, and thus founded Yale College,—a fact, I suppose, which still gives them their lien on the management of the college. Dartmouth College was an importation. It came into the State in the person of Eleazar Wheelock. He was the embodiment of it in idea, in purpose, and in fact. I do not overlook the co-operation of Governor Wentworth, without which all his efforts would have been futile. But it is to Wheelock that it owed its life. He brought his family with him to share the hardships of the wilderness. He brought with him as much of his own school as he could transfer. He sent one of his pupils to England to raise fifty thousand dollars for enlargement, and the first graduates of Dartmouth were men who had entered Yale, drawn thither by Eleazar Wheelock.

The charter gave Eleazar Wheelock, as the founder and first president of the college, the right to name a successor. After ten years of service he died, and in his will he named his son as his successor, John Wheelock, lieutenant-colonel in the Continental army. He took the office reluctantly. There were various reasons, which

seem to me sufficient reasons, why he should not have accepted it, but in deference to his father's wishes he took the office. He was a man somewhat stern in bearing, given to many of the formalities of his office, but a man of fidelity and a man of enterprise. As his successor after a long time, I speak in profound respect of him, for in his time the college turned out some of the greatest men it has produced. But in due time there was friction between the president and trustees. It has been said by some historians that the original ground of the controversy was religious; that was a mistake, so far as the original Board is concerned. All the men of this Board were of the same faith. It has been said that the ground of this controversy was political, but all the men were Federalists, with the exception of Judge Niles, who was a pronounced admirer of Jefferson. The controversy in this case grew out of the fact that the instrument which was to guard and secure the liberty of the college had in it the element of disruption. It allowed the President of the college to name his successor. The popular understanding is,— I do not think that it is your understanding, but I wish to correct it, however,— the popular understanding is that the State took the initiative in the Dartmouth College case. The State did not take the moral initiative in the Dartmouth College case. It did not of its own motion directly invade the rights of the college. As the controversy between the President and the Trustees grew apace, President Wheelock memorialized the Legislature to appoint a committee of visitation and asked that they be empowered to investigate the affairs of the college, using these strong words in asking for this committee of visitation that they should be "empowered to make organic improvements in the college." That appeal went



to the Legislature. In answer to that appeal from the college, the Legislature appointed a committee of visitation. The committee in its work was at first acceptable to both the president and trustees. Later the trustees deposed President Wheelock from his office. It was not until these events transpired that Governor Plumer, having advised with Mr. Jefferson, determined to secure the interference of the State in the affairs of the college. An act was passed by the Legislature to amend the charter of Dartmouth College, and to enlarge and improve the Corporation, changing the corporate name to that of Dartmouth University. The trustees at once tested the constitutionality of the act before the Supreme Court of the State.

They brought the case against Woodward, formerly the treasurer of the college, now the treasurer of the university, and in this form the case went to the State court and from the State court to the Supreme Court of the United States. I wish to repeat in this presence the fact that although the State of New Hampshire instituted proceedings affecting the charter of the college, the moral initiative came from the college. And from thence the appeal was taken to the Supreme Court of the United States.

One more fact, about which you may, or may not, agree with me. Notwithstanding the circumstances which surrounded the case, and gave it, as the toastmaster has said, its high dramatic character, it seems to me that if you could have changed in many ways the setting of the case, if you could have changed the part which many took in connection with it, still the case would have almost inevitably reached the same conclusion. I give due credit to the indefatigable enterprise and wise diplomacy of President Brown, to the great sagacity of Jeremiah Mason

and Jeremiah Smith, to the logic and emotion of Mr. Webster in placing the case before the Supreme Court, but I am still convinced that if you throw aside all these surroundings, if you could have given to the college case a weaker presentation, it would still have received by the hand of John Marshall, who dominated the case, the same decision which it did receive at his hands; for the time had inevitably come when any such case as that must call out such an interpretation of the Constitution as was given.

The question which was uppermost at the outset was that of the public and private character of Dartmouth College. It was difficult to distinguish between Moore's Charity school and Dartmouth College. I have never been able to determine exactly how it was that the old Indian school brought to Hanover by Eleazar Wheelock passed into Dartmouth College. Certain it is that of the funds given for the establishment and perpetuation of an Indian school not one dollar to-day remains in any form for the education of Indians. Dartmouth College, out of sentiment for the past, always remembers such a one, giving him tuition and board. Out of all the traditions, however, which have survived, nothing remains to-day which bears the value of a single dollar. Therefore there must have been some confusion at that time as to whether the college was a public or a private corporation in the eye of the law. That, however, was an immaterial question. The material question soon became whether the charter was or was not a contract. Marshall evidently held such a conception of the Constitution, that the decision of this question was predetermined. It seems probable that this decision would have been formulated however weak the case might have been which brought it to the attention

of the Chief Justice. When this case was decided, it accorded with decisions which affected the State of Maryland as well as the State of New Hampshire. It was the interpretation it gave which carried other States along with it. We had come to the time when men agreeing with John Adams and his school would have given one interpretation, and when men agreeing with Thomas Jefferson would have given another.

John Marshall decided the Dartmouth College case in keeping with that interpretation of the Constitution which from first to last was dominant in his mind. When the case reached this high issue, both the State and the college accepted it in good faith, and yet each learned, I think, a lesson from it. Certainly the college has learned the lesson, that it belongs to the State, and exists for the State in all its higher interests, and the State has learned more and more that it can do no better for itself than to build up education on the broad basis which the college affords as preserved in its original integrity.

You will pardon me, gentlemen, one word as I close. It is a word I think you will allow me to say in honest pride. It has been the singular fortune of Dartmouth College, not only in the personality of its graduates, but in its own corporate personality, to walk among the high places of men. Before it had found a shelter for its own home, it had free access to the Royal Chamber of Great Britain, and bore back for its name a name held in equal honor in the mother country and in the colonies. After the War of the Revolution, it was introduced by a great representative into the Supreme Court of the United States, where in its own corporate personality it stood unabashed and awaited the verdict which was to decide its destiny. Dartmouth College stands a debtor to men

of high distinction and to many unknown men, but among all men to whom it owes a debt of gratitude, I know of none to whom it owes a deeper debt of gratitude than to John Marshall, whose voice proclaimed throughout the length and breadth of the land in unanswerable terms, the security, the freedom, and the enduring life of Dartmouth College.

Mr. Charles H. Burns, speaking of Marshall as "The Chief Justice," in the course of his remarks said:

The chief wealth of civilized nations is the great and noble men and women they produce. The memory and the record of the lives of such people are inheritances of surpassing and enduring value. They are legacies that do not depreciate in the lapse of time. If it were possible to find a country that could not point to any truly great characters it had produced, it would have but little attraction for the human race. Whatever of material wealth it might contain would be transplanted to climes more fortunate in producing high talent and exalted character. . . .

The decisions of Chief Justice Marshall, which are many and varied, comprehending almost the entire sweep of the Constitution, have become no less famous and will be no less enduring than the instrument itself. Mr. Phelps has admirably said: "Time has demonstrated their wisdom. They have remained unchanged, unquestioned, unchallenged. All the subsequent labors of that high tribunal on the subject of constitutional law have been founded on, and have at least professed and attempted to follow, them. There they remain. They will always remain. They will stand as long as the Constitution stands; and if that should perish, they would still remain to display

to the world the principles upon which it rose, and by the disregard of which it fell."

Marshall was not only a commanding spirit in the legislative assemblies of Virginia, but was acknowledged to be the ablest constitutional lawyer in Congress, while he was a member of that body. He at once stepped to the front, and when he had discussed any measure his treatment was so exhaustive and conclusive that it was seldom, if ever, attacked.

That he was a diplomat of great wisdom, and learned in the law of nations, is established beyond all question by the State papers, of which he was the author, and which now form a part of the treasures of the government.

I know of no character whose career as a lawyer can be studied with greater profit by the younger members of the bar than that of John Marshall. He possessed all of the characteristics requisite to professional success — industry, integrity, perseverance, attention to details, persuasive powers, and a comprehensive knowledge of the law.

Of Marshall as "The Statesman," Mr. Oliver E. Branch said, in part:

The period which included the official, civil career of John Marshall was, in many ways, the most critical in the history of the American people. The seven years of the Revolution were, indeed, full of perils to the high hopes and splendid dreams of the fierce sons of freedom; and in that desperate conflict it often seemed as though the cause of the colonies was moving to imminent and disastrous collapse. And yet, in the darkest night of defeat, and above the murky clouds of disaster, which so

often and so long hung menacing over the patriot armies, there shone the unquenchable flame of that "spirit of liberty," to the recognition of whose just claims the mighty voices of Chatham and Burke vainly admonished the ministry and king; and which evermore presaged the final triumph of the patriotic cause. . . .

Time has vindicated the soundness of the conservative interpretation given to certain important provisions of the Constitution by John Marshall, in the decisions of the great cases which came before him, and it is not too much to say that they have contained "the saving element" in many crises of the nation's life. But they were not mere judicial decisions. They were the work and accomplishment of a great statesman who, like Milton, saw the vision "of a noble and puissant nation, rousing herself like a strong man after sleep, and shaking her invincible locks; and as an eagle, mewing her mighty youth, and kindling her undazzled eyes at the full mid-day beam." They were the decisions of a judge, whose experience and professional studies had logically and irresistibly brought to a sincere belief in the general soundness of the principles of the Federal party. As a soldier and officer under the command of Washington, he was an eye-witness to the inefficiency and structural weakness of the "Articles of Confederation;" and, at the close of the war, to their lamentable inadequacy as a form of government. And as the foreign and domestic affairs of the States, before the adoption of the Constitution, grew daily more involved and menacing, he realized the necessity, to use his own compact, expressive words, "of a government competent to its own preservation," a government "drawn from the people and depending on the people for its continuance." And in every situation

and office to which he was called, whether as a member of the Virginia Legislature, Virginia convention, member of Congress, envoy to France, Secretary of State, or Chief Justice of the Supreme Court, he strove firmly and consistently towards the realization of that ideal. . . .

Washington, Henry, Hamilton, Adams, Jefferson, Madison, Jay, Story, Marshall! What land or age can furnish forth such a group of noble names, wreathed about by so much of splendid fame! They are "the dead but sceptered sovereigns" of this mighty Republic, "who still rule our spirits from their urns."

"Those suns have set, O rise some other such."

Of Marshall as "A Literary Man," Mr. Charles R. Corning remarked:

Because "The Federalist" has for its motive a constitutional way of living, expressed with rhythmic balance and scholarly polish, it is none the less deserving the claim of a literary production. To reject "The Federalist" because it does not sound in the narrative of fiction is to reject "The Imitation of Christ" for the same reason. As the masterpiece of Thomas à Kempis portrays all that is elevating, passionate, and pious in religion, so the masterpiece of our American statesmen sets forth in fervent phrase the paramount principles of modern government.

When we admit that "The Federalist" is entitled to the rank of literature, and narrowness must give way and so admit it, then we shall have no difficulty in assigning to John Marshall a place among the literary figures of the republic. But Marshall is doubly entitled, for he has left not only to all ages a casket of constitutional literary

gems of the finest quality, but he has won his literary claim by virtue of his labor as a biographer.

The "Life of Washington" was John Marshall's only contribution to what we term professional literary work; it is his one book, his one credential to the world of letters. Were that work the sum of his intellectual ability it would still entitle him to the ranks of biographers and preserve his name in encyclopedias of literary men and women; but Marshall's fame covers the far wider field of constitutional research and exposition, where he stands without a rival. As one of the great authorities of judicial exposition in England, as well as in the United States and in the world of international law, his name is imperishable. John Marshall occupies a niche almost unique in the vast and imposing literature of the law.

His opinions, extending over the formative period of our national history, comprise a branch of literature such as very few lawyers leave behind them, and that those great legal discourses might be set before coming generations, they were published in 1839, under the scholarly and affectionate supervision of Joseph Story. The title of the book was "The Writings of John Marshall, late Chief Justice of the United States, upon the Federal Constitution." Herein are contained those immortal maxims of our national existence, those clear sentences expressive of that supreme organism from which nationality derived its succor and strength, let us hope, for life eternal. Let us, then, call *that* his lasting contribution to his country's literature, for there he shone like the Sirius of the heavens, outshining all others with that serene and illuminating genius which shall endure as long as the birthright of the American people stands for union and nationality.



In his review of "John Marshall, the Practitioner," Mr. John S. H. Frink said in part:

After young Marshall had concluded his Revolutionary service with an artificial equipment very meagre, but with a natural one unsurpassed, he commenced the practice of his profession in his native county.

Litigation was large. The courts were crowded with suits. During the war of the Revolution "*silent inter arma leges;*" and not only were legal rights suspended, which were revived at its termination, but new ones arising from the changed condition of affairs engaged the attention of the lawyer of those days. In such an era John Marshall embarked upon the practice of his profession among his old friends, neighbors and brother soldiers.

His mind was clouded by no sophistries, and he did not conceal his processes by redundant or rhetorical words. Despising the arts of vulgar advocates he enforced the subject as he saw it himself. Indeed he stripped his case of all these disguises, and held it up before the court in the clear light of justice. "Justice without wisdom is impossible." Having the wisdom to detect the justice of his case, he certainly had the wisdom to present it in its most convincing shape.

These were the characteristics of Mr. Marshall in his early practice, and they abided with him, developed and perfected, so long as he continued at the bar and during his illustrious career upon the bench.

Mr. Webster has said that the power of clear statement is the great power at the bar. That Mr. Marshall had in the most remarkable degree. He was little prone to exaggeration and rejected all the tricks of speech, but presented his case "plainly, concisely, accurately." He

spoke to the judgment, not to the passions or prejudices, of his auditors.

Any analysis of the powers of an eminent lawyer as a thinker and talker would be very inadequate without some description of his manner of speech and personal appearance. Mr. Marshall derived but little aid from these sources. His speech at the commencement of his discourse was slow and halting, his voice unmelodious and dry, and his personal bearing awkward. It seemed as if his mind was struggling with its topic, and his ideas were too many to find ready utterance. His hearers never for a moment doubted that he thoroughly understood the matter in hand and was master of it. He soon became so engrossed in his subject that he overcame these external disadvantages, until, to quote, "finally his voice became full and clear and rapid, his manner bold, . . . and he poured forth an unbroken stream of eloquence in a current deep, majestic, smooth and strong."

John Marshall's fame rests largely upon his opinions in the department of constitutional law. He seemed to read the Constitution by intuition, yet his preparation for this great work was laid strong and deep, while practising at the bar in Richmond, not necessarily in the courts of his State, but in her legislative assemblies and the Constitutional Convention.

## COMMONWEALTH OF MASSACHUSETTS.

In Massachusetts the following members of the bar were selected by the National Committee of the American Bar Association to act as a general committee of arrangements for the celebration of Marshall Day: Marquis F. Dickinson, chairman; James Barr Ames, Patrick A. Collins, Lewis S. Dabney, Henry S. Dewey, Frederick P. Fish, John C. Gray, Charles S. Hamlin, Alfred Hemenway, Robert M. Morse, and Moorfield Storey.<sup>1</sup>

It was found that plans had already been made at Harvard University for the delivery of an address before the Harvard Law School on the character and services of Chief Justice Marshall, by Professor James Bradley Thayer of that school. The committee availed itself of

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<sup>1</sup> The relation here given of the proceedings in the Commonwealth of Massachusetts in commemoration of John Marshall is, by permission of the editor, generously accorded, taken from a volume (pages xvii, 120) carefully edited, beautifully printed and embellished, bearing the following title: "John Marshall: The Tribute of Massachusetts, being the addresses delivered at Boston and Cambridge, February 4, 1901, in commemoration of the one hundredth anniversary of his elevation to the bench as Chief Justice of the Supreme Court of the United States. Edited by Marquis F. Dickinson, Esq., of the Boston Bar." Boston: Little, Brown, and Company, 1901.

The volume is illustrated by portraits of John Marshall, 1831 (photogravure from the original portrait by Henry Inman), John Marshall, 1808 (from a crayon by Saint-Mémin), Hosea Morrill Knowlton, Oliver Wendell Holmes, Henry Pickering Walcott, James Bradley Thayer, John Chipman Gray, Henry St. George Tucker, Richard Olney.

the opportunity thus presented to make that address a part of the general programme of the day. This programme included appropriate ceremonies in the Supreme Judicial Court at Boston in the morning, the address of Professor Thayer in Sanders Theatre at Cambridge in the afternoon, and a dinner at the new Algonquin Club in Boston, under the auspices of the Bar Association of the City of Boston, in the evening. The following gentlemen, officers of the Boston Bar Association, were appointed by that body to have charge of the arrangements for the dinner: Charles P. Greenough, vice-president; William F. Wharton, secretary; William S. Hall, treasurer; Charles B. Southard, representing the executive committee.

Inasmuch as the appointment of John Marshall of Virginia was made by President John Adams of Massachusetts, it was thought by the committee to be appropriate that the union of the two States in so auspicious an event should be recognized at the proposed celebration by inviting some distinguished member of the bar of Virginia to be the special guest of the day. Accordingly, Professor Henry St. George Tucker, Dean of the Law School of Washington and Lee University, Lexington, Virginia, was invited, and honored the occasion by his presence.

The exercises in the Supreme Judicial Court were brief but deeply impressive. The court room proved entirely inadequate for the accommodation of those seeking admittance. Hundreds turned reluctantly away from its doors. The bar was thronged by many of its best known members, together with a few distinguished citizens not of the legal profession, especially invited to be present. The justices of the Superior and Municipal Courts, led by their respective Chief Justices, Mason and Parmenter,

were in attendance. At ten o'clock the justices of the Supreme Judicial Court came in, led by his Honor, Oliver Wendell Holmes, Chief Justice, and accompanied by his Excellency W. Murray Crane, Governor of the Commonwealth, who occupied a place upon the bench at the right of the Chief Justice. All remained standing while proclamation was made by the crier, according to the ancient formula used in opening the courts of Massachusetts. The address to the court by Attorney-General Knowlton, representing the members of the bar, and the response by Chief Justice Holmes followed, after which the court adjourned.

The address of Professor Thayer was delivered in Sanders Theatre, Harvard University, Cambridge, at four o'clock P. M. The severest snow storm of the season had set in before midday, but this did not prevent the attendance of a very large audience, comprising the Faculty and students of the Harvard Law School, heads of other departments in the University, judges and members of the bar from different sections of the Commonwealth. As President Eliot was absent from the country, the speaker was introduced by Dr. Henry Pickering Walcott, Acting President of the University.

Two hundred and twenty-five persons sat down at the dinner given in the evening under the auspices of the Bar Association of the City of Boston, in the banquet hall of the New Algonquin Club. The size of the room so closely limited the number who could be accommodated that a large number of the members of the Bar were necessarily excluded from attendance upon the dinner. Professor John Chipman Gray, of the Harvard Law School, President of the Bar Association of the City of Boston, presided, and introduced the speakers of the

evening, who were Professor Tucker of Virginia and Richard Olney of Massachusetts. Their addresses closed the exercises of the day.

## PROCEEDINGS IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

### *Address of Attorney-General Knowlton.*

Upon this morning, a century ago, the Supreme Court of the United States assembled for the first time in the city of Washington. The term city was one of courtesy rather than of description; for it was a place of swamps and woods, a city without inhabitants, a town without houses. Even Pennsylvania Avenue, to-day the most distinctly national, if not the most historic, street in America, was a morass covered with underbrush, impassable to horse or foot, without visible demarkation, a tangled wilderness. There was only the dream of a capital. But in that city and upon the very eminence where it met this day one hundred years ago, the court has since always been held, though more than once within sound, even within the very sight, of the guns of the enemies of the Republic.

It happened, moreover, that on this same day, and in this same place, the commission of a new Chief Justice was read; and the term was presided over for the first time by one who was destined, for more than a third of the century that has since intervened, to direct and control the policy of the court, and to establish the place which it has since maintained, not only as one of the three great and co-ordinate departments of the Government of the Republic, but also as the most august and

powerful tribunal in the civilized world. This new Chief Justice was John Marshall of Virginia.

The bar of the United States has deemed these two auspicious events of sufficient moment to deserve the attention of the courts upon the occasion of this anniversary. Occurring, by one of those signal coincidences with which history is replete, upon the first judicial day of the nineteenth century, they also marked the birth and beginning, if not the creation and the cause, of the national grandeur which has characterized that century. Indeed, so closely have we come to trace cause and effect between the judgments of that court and the growth of the nation, that to-day, even upon this threshold of another century, when, as then, men are at issue upon a momentous question relating to the future policy of the United States, the voice of clamor is hushed, and Congress waits until this same august tribunal pronounces the decree which shall bind or expand, as the case may be, the wings of National ambition.

Up to that time the importance of the Supreme Court in the scheme of the Federal Government had scarcely been appreciated. In the original proposals for the erection of a capitol, prepared, I believe, under the direction of George Washington himself, no provision was made for the accommodation of the court. The founders of the nation had inherited the traditions of the mother country, where, owing to the absolute power of Parliament, the function of the judiciary was limited to the settlement of private disputes, its only relation to the Government being on the criminal side. The idea of enforcement of constitutional limitations by the judiciary upon the other departments of the Government and upon the States, axiomatic as such doctrines appear to us, was

at that time by no means understood, much less conceded.

Even the justices themselves failed to realize their importance. Appointments to the bench were often declined, and resignations were frequent. Some judges retired to go upon the bench of a State court. Both of the Chief Justices who preceded Marshall (not counting Rutledge, whose appointment was not confirmed, and who presided only one term) resigned their offices to become ministers to foreign courts; and Jay, the first Chief Justice, when asked after an interval of retirement to resume his position, declined, saying, "I left the bench perfectly convinced that, under a system so defective, it could not attain the energy, weight, and dignity which were essential to its affording due support to the National Government."

The whole business of the court during the first eleven years of its existence is recorded in less than a single volume of the size of current reports. Most of the questions before it concerned procedure and practice in the Federal courts. The meagre decisions touching the scope of its own powers and duties were for the most part confined to denial rather than assertion, like its refusal to advise the President, and its deciding, or rather its hesitation in deciding, in Hayburn's case, that Congress could not impose upon it the duty of acting as auditor to hear pension claims. It did assert the right to hear the case of a citizen against a State, and to enter judgment against the State; but this right was promptly taken away by an amendment to the Constitution. Even Marshall continued to be a member of the President's Cabinet after his appointment to the bench, until the close of the Presidential term. So little was the true function of the court



understood, that one of the earliest cases reported seems to have consisted of the trial of issues of fact by a jury, the charge being given by one of the justices. It had been a court of weak beginnings and of insignificant achievements. It had not found its place in the scheme of government. When the nineteenth century came in its great work was yet before it.

The Federal Constitution was no spontaneous utterance of a united people. It was the result of a long, a bitter, and an unending contest. The conflict between the sovereignty of the State and the sovereignty of the Nation did not then begin, nor is it yet ended. Although, when the only alternative in sight was anarchy, a sullen assent was vouchsafed to the terms of the Constitution, both sides reserved the right to continue the contest. Both claimed that it could be interpreted to meet their views. Moreover, upon its adoption other contentions arose upon the question how far it acted as a restraint upon the executive and the legislative departments. The beginning of this century saw these contentions, and especially that relating to the sovereignty of the States, existing in all their fierceness, threatening the destruction of the Republic. The Nation was at the parting of the ways.

The only power adequate to the settlement of these questions under the Constitution (and even this was not then conceded) was the Supreme Court. But a chief was needed to direct the work of that court, who should have the courage to assert its dignity and power. He must be one who had participated in the discussions leading to the adoption of the Constitution, familiar with its origin and its history. He must be not only a great and sound lawyer, but one whose public career, no less than the spotlessness of his personal reputation, had earned for

him the respect and confidence of all men. He must be one who was willing to put aside private ambition, and make it his life-work to establish the rank of the court given to it by the Constitution, but which hitherto had scarcely been conceded to it. As a concession to her importance it were better that he be a citizen of Virginia; and John Adams naturally believed he should be a Federalist. He found all these essentials in John Marshall. The hour of fate had come; and he was the man of the hour.

Speculations on what might have been the result had important events happened otherwise than they did, are usually profitless. But one cannot forbear indulging in a shudder at the contemplation of what might have been the destiny of the nation had the appointment of Chief Justice been made a few months later by that apostle of the anti-Federalists, Thomas Jefferson. One experiment of a league of sovereign States had been tried and had failed. Another would have meant hopeless wreck. More than once, as we review the events of our history, are we led to recognize with reverence the hand of an overruling Providence, guiding our path, shielding us from danger and destruction, chastening us when we have gone astray, and leading us on to become the lamp of liberty enlightening the world.

John Marshall grasped the helm with the hand of a master. There was no chart to guide his course, excepting his conception of the spirit of the Constitution. But that conception was based upon a belief in the sovereignty of the nation, and was elevated by a conviction of the power and dignity of the judicial branch of the Government. Within three years he had disposed of a contention, seriously made, that Congress was not bound by

the Constitution, excepting as it might interpret for itself the terms of that instrument. He pronounced one of its statutes void, and thus asserted the supremacy of his court over the legislative department,—a supremacy which has never since been challenged, and which it is difficult for us now to conceive ever to have been challenged. Soon after he pronounced void an act of a State legislature which was in violation of the Constitution of the United States. Then men began to appreciate the fact that the Federal power was supreme, and that, under the interpretation of John Marshall, the Constitution did not provide a mere rope of sand for the States, but was the strong tie which bound them together into a Nation.

From these sound beginnings he proceeded with unfaltering steps, literally building up a nation upon the foundation of the Constitution. His views did not at first, nor even during his life, meet with universal acquiescence. During the whole of the two generations of his judicial service, he was the subject of bitter criticism, and more than once there was almost open revolt. He himself at times became disheartened, and in a letter to his associate, Joseph Story, in 1832, he said: "I yield slowly and reluctantly to the conviction that our Constitution cannot last." This was but three years before his death, and it may well be that his last hours were clouded with doubts of the future of his country. But he had builded more wisely and surely than he knew. His interpretation of the spirit of the Constitution, besides having the weight of authority, came eventually to be accepted as well for the truth of its resistless logic. He was not merely a great and learned judge. There have been others. His title to the eternal gratitude of his

countrymen is found in the fact that he was the creator of constitutional government, as we now understand that term. The result of his work is the grandeur of the imperial flag under which we live.

Of the life and career of John Marshall it is not for me to speak in detail at this time. It will be better done on this anniversary by others more competent for the task. Beyond declaring his part in the growth of the nation, as I have briefly attempted to do, I will content myself with observing that, considered merely as a judge, his career was a model for all who have come after. Dignified and genial, patient in attention, learned and logical, luminous and convincing in opinions; welcoming the help that the bar can give to the court; not lacking in respect for the executive and legislative departments, and for that presumption of right which should be accorded to them, but never forgetting that the function of the court is to be true to its own lights and not subservient to the standard of the Legislature,— he created for the court a respect and esteem which has never since been shaken, and established a standard of judicial deportment which may well be followed to-day.

But it is by the high principles he promulgated and upheld, and upon which this nation has grown to grandeur, rather than by any mere judicial eminence, that he will be remembered while the nation endures.

As I stood, last month, upon the steps of the National Capitol, I was led to contrast in my mind the splendid panorama there unfolded with the rude beginnings of a century ago. But I also reflected that in the luminous clearness of John Marshall's vision there has been, there can be, no advance. A hundred years hence the material achievements of the nation may eclipse those of to-day,

even as we have surpassed those of the founders of the Republic; or, on the other hand, some future Marius may contemplate from the same eminence upon which I stood the ruins of the capital of a once great nation. The things of this world pass away and are forgotten. But the prophetic wisdom and truth of the principles enunciated by John Marshall will endure through the ages, and his courage and sagacity in discovering and establishing them will be his deathless renown.

In view of the solemnity of this anniversary and of what it means to us and to our fathers and to our children as well, I have the honor to suggest in behalf of my associates that the work of the court be suspended for the day, that the bar and the court may appropriately celebrate the occasion; and to that end I move that the court do now adjourn.

**Response of Chief Justice Holmes.**

As we walk down Court street in the midst of a jostling crowd, intent like us upon to-day and its affairs, our eyes are like to fall upon the small, dark building that stands at the head of State street, and, like an ominous reef, divides the stream of business in its course to the gray cliffs that tower beyond. And, whoever we may be, we may chance to pause and forget our hurry for a moment, as we remember that the first waves that foretold the coming storm of the Revolution broke around that reef. But, if we are lawyers, our memories and our reverence grow more profound. In the Old State House, we remember, James Otis argued the case of the writs of assistance, and in that argument laid one of the foundations for American constitutional law. Just as that

little building is not diminished, but rather is enhanced and glorified, by the vast structures which somehow it turns into a background, so the beginnings of our national life, whether in battle or in law, lose none of their greatness by contrast with all the mighty things of later date, beside which, by every law of number and measure, they ought to seem so small. To us who took part in the Civil War, the greatest battle of the Revolution seems little more than a reconnoissance in force, and Lexington and Concord were mere skirmishes that would not find mention in the newspapers. Yet veterans who have known battle on a modern scale are not less aware of the spiritual significance of those little fights, I venture to say, than the enlightened children of commerce who tell us that soon war is to be no more.

If I were to think of John Marshall simply by number and measure in the abstract, I might hesitate in my superlatives, just as I should hesitate over the battle of the Brandywine if I thought of it apart from its place in the line of historic cause. But such thinking is empty in the same proportion that it is abstract. It is most idle to take a man apart from the circumstances which, in fact, were his. To be sure, it is easier in fancy to separate a person from his riches than from his character. But it is just as futile. Remove a square inch of mucous membrane, and the tenor will sing no more. Remove a little cube from the brain, and the orator will be speechless; or another, and the brave, generous and profound spirit becomes a timid and querulous trifler. A great man represents a great ganglion in the nerves of society, or, to vary the figure, a strategic point in the campaign of history, and part of his greatness consists in his being *there*. I no more can separate John Marshall

sight depends upon the mind of him who sees it. The setting aside of this day in honor of a great judge may stand to a Virginian for the glory of his glorious State; to a patriot for the fact that time has been on Marshall's side, and that the theory for which Hamilton argued, and he decided, and Webster spoke, and Grant fought, and Lincoln died, is now our cornerstone. To the more abstract but farther-reaching contemplation of the lawyer, it stands for the rise of a new body of jurisprudence, by which guiding principles are raised above the reach of statute and State, and judges are entrusted with a solemn and hitherto unheardof authority and duty. To one who lives in what may seem to him a solitude of thought, this day — as it marks the triumph of a man whom some Presidents of his time bade carry out his judgments as he could — this day marks the fact that all thought is social, is on its way to action; that, to borrow the expression of a French writer, every idea tends to become first a catechism and then a code; and that according to its worth his unhelped meditation may one day mount a throne, and without armies, or even with them, may shoot across the world the electric despotism of an unresisted power. It is all a symbol, if you like, but so is the flag. The flag is but a bit of bunting to one who insists on prose. Yet, thanks to Marshall and to the men of his generation — and for this above all we celebrate him and them — its red is our life-blood, its stars our world, its blue our heaven. It owns our land. At will it throws away our lives.

The motion of the bar is granted, and the Court will now adjourn.

PROCEEDINGS IN SANDERS THEATRE, HARVARD  
UNIVERSITY.

**Introductory Remarks by Henry Pickering Walcott, Acting  
President of Harvard University.**

One hundred years ago President John Adams of Massachusetts nominated John Marshall of Virginia, then Secretary of State, Chief Justice of the Supreme Court of the United States. For more than a generation he presided there, and largely in consequence of his influence it became the most august judicial tribunal on the face of the earth, of which De Tocqueville wrote, "In the hands of the Supreme Court repose unceasingly the peace, the prosperity, the existence even, of the Union." In the year 1806 Harvard College bestowed upon Marshall its highest honorary degree, and now, in another century, we meet here in this Memorial Hall to again do honor to the undiminished memory of John Marshall.

I have the honor of presenting to you the orator of this afternoon, James Bradley Thayer, Weld Professor of Law.

**Address of Professor Thayer.<sup>1</sup>**

It is one hundred years ago to-day since the Supreme Court of the United States first sat at Washington, the new capital,—that "wilderness city, set in a mud-hole," of whose beginnings we have lately been reading. The Court sat with a new Chief Justice, John Marshall of Virginia. It is in commemoration of him and of this

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<sup>1</sup> This address of Professor Thayer is printed by kind permission of Messrs. Houghton, Mifflin and Company, publishers of a volume entitled "John Marshall," by the same author, in which most of this address is contained.



event, so auspicious, the beginning of inestimable benefits to his country, that we have gathered now, moved by an impulse that brings together others of our countrymen all over the United States. Outside of Virginia few have a better right to celebrate this event than who are here assembled; for the President who selected and commissioned Marshall was John Adams of Massachusetts, alumnus of Harvard and member of the bar.

At that time Marshall was something over forty years old. He was born on September 24, 1755. His home had always been in Virginia. The first twenty years of his life were passed wholly in that part of Prince William county which became, two or three years after his birth, the new, wide-spreading frontier county of Fauquier,—so named, after a Virginia fashion, from the new royal Governor of 1758. He was born in the eastern part of it, and after some ten years went with his father to the western part, at Oakhill and the neighborhood, just under the Blue Ridge. They show you still at Midland, on the Southern Railroad, a little south of Manassas, a small, rude heap of bricks and rubbish, as being all that is left of the house where Marshall was born; and children on the farm reach out to you a handful of the bullets with which that sacred spot and the whole region were thickly sown before a generation had passed, after Marshall's death. His education was got partly from his father, a man of character and marked courage and capacity, who served as colonel in the War of Independence, and partly from such teachers as the neighborhood furnished. For about a year, also, he was at a school in Westmoreland county, where his father and George Washington had attended; and there James



OAK HILL HOME.

the beginning of inestimable benefit to the country, that was here gathered now, moved together the things together, others of our countrymen, and the United States. Outside of Virginia, we have a better right to call this event than we who are here, as it is the President who selected and counseled the man, John Adams of Massachusetts and a member of the Suffolk bar.

At that time, James was something over forty-five years of age, and he died on September 24, 1755. His family was from Virginia. The first twenty years of his life were wholly in that part of Prince George's County, some, two or three years after the spreading frontier county of Virginia, from the Virginia fashion, from the east. He was born in the east. Some ten years went with his father at Oakhill and the neighborhood under the Blue Ridge. They show you still a place, on the Northern Railroad, a little south of the station, a heap of bricks and rubbish, as the house where Marshall was born. The farm reach out to you a handful of the earth in which that sacred spot and the wheat was thickly sown before a generation had passed. His education was got partly from his father, a man of character and marked courage and ability, who served as colonel in the War of Independence, and partly on such teachers as the neighbors. For about a year, also, he was at school in Frederick County, where his father was a member of the bar; and there James





Monroe was his schoolmate. At home, when he was about eighteen years old, he took up Blackstone, a book then lately printed. But he dropped it soon, for difficulties with the mother country were thickening, and Marshall began the military drill.

From 1773, for eight years, he was mainly a soldier, at first learning and teaching the drill, and then for five or six years in active service, as an officer in the Virginia Militia and the Continental Army.

During a lull, for a few months, in the latter part of this period, he studied law and philosophy at William and Mary College; and, in 1780, was admitted to the bar. Beginning practice the next year, for the following sixteen years, before entering the field of national politics, he practiced law, at first in his native county, and then, after his marriage in 1783, at Richmond—a little town in the upland, whither for safety the State archives had been transferred from Williamsburg, and which had now become the capital of the State. From the beginning he was successful. Soon his success was distinguished, and he led the Richmond bar. During this period he was eight times a member of the Assembly; for two years on the Executive Council; and a member of the Virginia Federal Convention in 1788. Once only he argued a case before the Supreme Court in Philadelphia. Although he lost it in 1796, yet his argument made him famous, and he came then to know the leaders in politics. Having declined, in 1795, the office of Attorney-General of the United States, and in 1796 that of Minister to France, both offered him by Washington, he accepted the next year, at the hands of Adams, the position of Envoy-Extraordinary to France, in connection with Charles Cotes-

worth Pinckney of South Carolina and Elbridge Gerry of Massachusetts.

He returned to the United States in 1798, and new honors poured in upon him fast. Very unwillingly, at the urgent request of Washington, he allowed himself to be a candidate for Congress in that year, and was elected. In the same year, he declined the place of justice of the Supreme Court of the United States, offered him by President Adams. In the spring of 1799, without his own knowledge, he was nominated Secretary of War, and, against his request to withdraw the nomination, it was confirmed. But he did not enter upon this office; for the sudden withdrawal of Timothy Pickering as Secretary of State led to Marshall's appointment as his successor. He accepted that office, and filled it for the remainder of the President's term. And finally, while he had still to serve as Secretary of State for a month or more, on the 31st of January, 1801, he was commissioned Chief Justice of the United States. During the following month, at the President's request, he joined in his own person, strangely enough as it seems to us of the present day, the functions of the head of the judiciary and head of the executive Cabinet. This had happened, however, twelve years before, in the case of John Jay.

Such was the experience, and such the training, that of a soldier, a lawyer and a statesman, with which our great Chief Justice began his new career.

During the thirty-four years and more that were to follow, before Marshall died in office, in his eightieth year, he bore himself with that distinction of intellect, that competent learning, and that strength, dignity, sweetness, and unaffected simplicity of character that all men know, and that made him no less beloved by his

friends than he was honored and admired by all his countrymen.

A strange felicity it was for our country in those early shaping days, when the character of its leaders meant so much, that the career of Washington, as its Chief Executive, should have been followed so soon by that of Marshall in its chief judicial seat. Hardly can two nobler public men be found in the history of mankind than these two Virginians. Yes, Virginians! and we like to think of that to-day as we welcome here our distinguished guest [Mr. Tucker].

Virginia gave us these imperial men,—  
She gave us these unblemished gentlemen:  
What can we give her back but love and praise,  
As in the dear, old, unestranged days.

I have now given a short summary of Marshall's life up to the time that he became Chief Justice. It is with great regret that I pass over most of the details of his personal history. A few of them only may be mentioned.

It was on his visit to Virginia, towards the end of 1779, that he met at Yorktown the beautiful little lady, fourteen years old, who became his wife three years later, and who was to be the mother of his ten children,<sup>1</sup> and to receive from him the tenderest devotion until the day of her death, in 1831. Some letters of her older sister, Mrs. Carrington, written to another sister, give us a glimpse of Captain Marshall in his twenty-fifth year. These ladies were the daughters of Jaquelin Ambler, Treasurer of the Colony, living next door to the family of Colonel Marshall. Their mother was that Rebecca Burwell for whom, under the name of "Belinda," Jefferson had languished, in his youthful correspondence of

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<sup>1</sup> Only six of his children grew to full age.



some twenty years before. The girls had the highest expectations when they heard that Captain Marshall was coming home from the war. They were to meet him first at a ball, and were contending for the prize beforehand. Mary, the youngest, carried it off. "At the first introduction," writes her sister, who was but one year older, "he became devoted to her. For my own part," she adds, "I felt not the smallest wish to contest the prize with her. . . . She, with a glance, divined his character, . . . while I, expecting an Adonis, lost all desire of becoming agreeable in his eyes when I beheld his awkward, unpolished manner and total negligence of person. How trivial now seem all such objections," she adds, writing in 1810. "His exemplary tenderness to our unfortunate sister is without parallel." She had early become subject to a nervous affection, that lasted all her life. "But this," it is added, "has only seemed to increase his care and tenderness, and he is, as you know, as entirely devoted as at the moment of their first being married. Always, and under every circumstance an enthusiast in love, I have heard him declare that he looked with astonishment at the present race of lovers, so totally unlike what he had been himself. His never-failing cheerfulness and good humor are a perpetual source of delight to all connected with him, and . . . have been the means of prolonging the life of her he is so tenderly devoted to."

"He was her devoted lover to the very end of her life," another member of his family has said. And Judge Story, in speaking of him after his wife's death, described him as "the most extraordinary man I ever saw for the depth and tenderness of his feelings."

A little touch of his manner to his wife is seen in a letter written to her from the city of Washington, on Feb-

ruary 23, 1825, in his seventieth year. He had had an injury to his knee, about which Mrs. Marshall was anxious. "I shall be out," he writes, "in a few days. All the ladies of the secretaries have been to see me; some more than once, and have brought me more jelly than I could eat, and many other things. I thank them and stick to my barley-broth. Still I have lots of time on my hands. How do you think I beguile it? I am almost tempted to leave you to guess until I write again. You must know I begin with the ball at York, our splendid Assembly in the Palace in Williamsburg, my visit to Richmond for a fortnight, my return to the field, and the very welcome reception you gave me on my arrival at Dover, our little tiffs and makings-up, my feelings when Major Dick<sup>1</sup> was courting you, my trip to the Cottage [the Ambler home in Hanover county, where the marriage took place], the thousand little incidents, deeply affecting in turn." This was the ball of which Mrs. Carrington wrote; and of the "Assembly at the Palace" she also gave an account, remarking that "Marshall was devoted to my sister."

After his marriage, and when he had begun practice at Richmond, he still retained certain simple and rustic ways, brought from the army and his life in the mountain region, that troubled some persons at Richmond, whose conception of greatness was associated with very different models of dress and behavior. "He was one morning strolling," we are told, "through the streets of Richmond, attired in a plain linen roundabout and shorts, with his hat under his arm, from which he was eating cherries, when he stopped in the porch of the Eagle Hotel, indulged in a little pleasantry with the landlord,

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<sup>1</sup> Richard Anderson, the father of the hero of Fort Sumter.

and then passed on." A gentleman from the country was present who had a case coming on before the Court of Appeals, and was referred by the landlord to Marshall as the best lawyer to employ. But "the careless and languid air" of Marshall had prejudiced the man, and he refused to employ him. The clerk of the court, by and by, also recommended Marshall, but without success. The client observed in court an elderly lawyer in black, with a powdered wig, and retained him. In the first case this man and Marshall spoke on opposite sides. The gentleman listened, and secured Marshall at once; frankly telling him the whole story, and adding that of the hundred dollars he had brought to pay his lawyer, only five were left. Marshall good-naturedly took it and helped in the case.

In the Virginia Federal Convention of 1788, at the age of thirty-three, he is described, rising after Monroe had spoken, as "a tall young man, slovenly dressed in loose summer apparel. . . . His manners," it is said, "like those of Monroe, were in strange contrast with those of Edmund Randolph or of Grayson." In such stories as these, one is reminded, as he is often reminded, of a resemblance between Marshall and Lincoln. Very different men they were, but both thorough Americans, with un-borrowed character and manners, and a lifelong flavor derived from no other soil.

In those efforts, on the part of some of the leaders of Virginia and the South, early in the century, to rid themselves of slavery, to which we at the North have never done sufficient justice, Marshall took an active part. The American Colonization Society was organized in 1816 or 1817, with Bushrod Washington for president. In 1823 an auxiliary society was organized at Richmond, of which

Marshall was president, an office which he held nearly or quite up to the time of his death. It is interesting to observe that one of the Virginia plans for colonization was to have worked out the abolition of slavery in the year 1901.

Of slavery Marshall wrote to a friend, in 1826: "I concur with you in thinking that nothing portends more calamity and mischief to the Southern States than their slave population. Yet, they seem to cherish the evil, and to view with immovable prejudice and dislike everything which may tend to diminish it. I do not wonder that they should resist any attempt, should one be made, to interfere with the rights of property, but they have a feverish jealousy of measures which may do good without the hazard of harm, that I think very unwise."

We often hear of the Chief Justice at his "Quoit Club." He was a famous player at quoits, and kept it up all his life. Chester Harding, the artist who painted the full-length portrait of Marshall that hangs in the Harvard Law School, tells us of him as he saw him at the Quoit Club in his seventy-fifth year. Fortunately, language did not, like paint, limit the artist to a single moment of time; he gives us the Chief Justice in action. The club used to meet every week in a grove, about a mile from the city. Harding went early. "I watched," he says, "for the coming of the old Chief. He soon approached, with his coat on his arm and his hat in his hand, which he was using as a fan. He walked directly up to a large bowl of mint julep, which had been prepared, and drank off a tumblerful of the liquid, smacked his lips, and then turned to the company with a cheerful 'How are you, gentlemen?' He was looked upon as the best pitcher of the party, and could throw heavier quoits than any

other member of the club. The game began with great animation. There were several ties; and before long I saw the great Chief Justice of the United States down on his knees, measuring the contested distance with a straw, with as much earnestness as if it had been a point of law; and if he proved to be in the right, the woods would ring with his triumphant shout."<sup>1</sup>

An entertaining account has been preserved by the late Mr. George W. Munford, of a meeting of this club, apparently while Marshall was still at the bar, at which he and Wickham, a leading Virginia lawyer, one of the counsel of Aaron Burr, were the caterers. At the table Marshall announced that at the last meeting two members had introduced politics, a forbidden subject, and had been fined a basket of champagne, and that this was now produced as a warning to evil-doers. As the club seldom drank this article, they had no champagne glasses, and must drink it in tumblers. By and by, the quoit players retired for a game. Most of the members had smooth, polished brass quoits. But Marshall's were iron,—large, rough, and heavy, such as few of the members could throw well from hub to hub. Marshall himself threw them with great success and accuracy, and often "rang the meg." On this occasion, Marshall and Parson Blair led the two parties of players. Marshall played first, and "rang the meg." Parson Blair did the same; his quoit came down plumply on top of Marshall's.

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<sup>1</sup> In speaking of this same club, another writer says: "We have seen Mr. Marshall, . . . when he was Chief Justice of the United States, on his hands and knees, with a straw and a penknife, the blade of the knife stuck through the straw, holding it between the edge of the quoit and the hub, and when it was a very doubtful question, pinching or biting off the ends of the straw, until it would fit to a hair."

At this there was uproarious applause, which drew out all the others from the dinner. Then came an animated controversy as to what should be the effect of this exploit. All returned to the table, had another bottle of champagne, and listened to arguments, one from Marshall, *pro se*, and one from Wickham, for Parson Blair. Marshall's argument is a humorous companion-piece to any of his elaborate judicial opinions. First he formulated the question: "Who is winner when the adversary quoits are on the meg at the same time?" Then he stated the facts, and added that the question was one of the true construction and application of the rules of the game. The first one ringing the meg, he argued, has the advantage; no other can succeed who does not begin by displacing him. The parson, he willingly allowed, deserves to rise higher and higher in everybody's esteem; but then he must not do it by getting on his adversary's back. That is more like leap-frog than quoits. Again, the legal maxim is, *Cujus est solum ejus est usque ad coelum*. His own right, as first occupant, extended to the vault of heaven. No opponent can gain any advantage by squatting on his back—he must either bring a writ of ejectment, or drive him out *vi et armis*. And then, after further argument of the same sort, he asked judgment; and sat down, amidst great applause.

Mr. Wickham then rose and made an argument of a similar pattern. No rule, he said, requires an impossibility. Mr. Marshall's quoit is twice as large as any other; and yet it flies from his arm like the iron ball, at the Grecian games, from the arm of Ajax. It is an iron quoit, unpolished, jagged, and of enormous weight. It is impossible for an ordinary quoit to move it. With much more of the same sort, he contended that it was a

drawn game. After animated voting, protracting the uncertainty as long as possible, it was so decided. On another trial, Marshall clearly won.

Of Marshall's athletic powers when he was young, President Quincy says that he used to hear them celebrated among the men of the South whom he met in Washington early in the century. They said that he was the only man in the army who could put a stick on the heads of two persons of his own height (six feet) and clear it at a running jump. He was famous also in the foot-race; and, running in his stocking feet, was nicknamed "Silverheels" by the soldiers, from his uniform success, and the color of the yarn with which his mother finished off his blue stockings at the heel.

Of Marshall's appearance on the bench we have a picture in one of Story's letters from Washington, while he was at the bar. He is writing in 1808, the year after the Burr trial—the year of the St. Mémín portrait. "Marshall," he says, "is of a tall, slender figure, not graceful or imposing, but erect and steady. His hair is black, his eyes small and twinkling, his forehead rather low. His manners are plain yet dignified, and an unaffected modesty diffuses itself through all his actions. His dress is very simple, yet neat. I love his laugh,—it is too hearty for an intriguer,—and his good temper and unwearied patience are equally agreeable on the bench and in the study." And again, Story said of him in his address to the Suffolk bar, after his death: "Upon a first introduction he would be thought to be cold and reserved; but he was neither the one nor the other. It was simply a habit of easy taciturnity, watching, as it were, his own turn to follow the line of conversation, and not to presume to lead it. . . . He had great simplicity of

character, manners, dress, and deportment, and yet with a natural dignity that suppressed impertinence and silenced rudeness. His simplicity had an exquisite *naïveté* which charmed every one, and gave a sweetness to his familiar conversation approaching to fascination."

In the autumn of 1831, Marshall went to Philadelphia to undergo the torture of the operation of lithotomy, before the days of ether. It was the last operation of the distinguished surgeon, Dr. Physick. Another eminent surgeon who assisted him, Dr. Randall, has given an account of this occasion. After speaking of the danger of the operation on so old a man, he adds that "his recovery was in a great degree owing to his extraordinary self-possession, and to the calm and philosophical views which he took of his case." In making preparations, Dr. Randall visited the patient about nine o'clock in the morning. "Upon entering his room, I found him engaged in eating his breakfast. He received me with a pleasant smile . . . and said, 'Well, Doctor, you find me taking breakfast, and I assure you I have had a good one. I thought it very probable that this might be my last chance, and therefore I was determined to enjoy it and eat heartily.' I expressed the great pleasure which I felt at seeing him so cheerful, and said that I hoped all would soon be happily over. He replied to this that he did not feel the least anxiety or uneasiness respecting the operation or its results; . . . that he had not the slightest desire to live, laboring under the sufferings to which he was then subjected; that he was perfectly ready to take all the chances of an operation, and he knew there were many against him; and that if he could be relieved by it he was willing to live out his appointed time, but if



not, would rather die than hold existence accompanied with the pain and misery which he then endured.

"After he finished his breakfast I administered to him some medicine; he then inquired at what hour the operation would be performed. I mentioned the hour of eleven. He said, 'Very well; do you wish me now for any other purpose, or may I lie down and go to sleep?' I was a good deal surprised at this question, but told him that if he could sleep it would be very desirable. He immediately placed himself upon the bed and fell into a profound sleep, and continued so until I was obliged to rouse him in order to undergo the operation. He exhibited the same fortitude, scarcely uttering a murmur, throughout the whole procedure, which, from the peculiar nature of his complaint, were necessarily tedious." From the patient over a thousand calculi were taken; he had a perfect recovery; nor did the disorder ever return.

It was at this period, in 1831 and 1832, that Inman's fine portrait of him, now hanging in the rooms of the Law Association of Philadelphia, was taken for the bar of that city. A replica is on the walls of the State Library in Richmond, which Marshall himself bought for his only daughter. This portrait is regarded as the best that was ever taken of him in his later life. Certainly it best answers the description of him by an English traveler, who saw him in the spring of 1835, and said that "the venerable dignity of his appearance would not suffer in comparison with that of the most respected and distinguished-looking peer in the British House of Lords."

After his recovery in 1831, Marshall seems to have been in good health down to the early part of 1835.

Then, we are told, he suffered "severe contusions"<sup>1</sup> in the stage-coach in returning from Washington. His health now rapidly declined, and he went again to Philadelphia for relief, where he died on July 6, 1835, of a serious disorder of the liver.

He missed from his deathbed his eldest son, whom he had expected and asked for; and he never learned the pathetic tragedy which you may read now on the gravestone of that son behind the old house at Oakhill. Thomas Marshall, in hastening to his father near the end of June, was passing through the streets of Baltimore, when he was suddenly killed in a storm by the blowing down of a chimney.

The great Chief Justice was carried home with every demonstration of respect and reverence, and was buried by the side of his wife in the Shockoe Hill Cemetery in Richmond. There to-day, upon horizontal tablets, are two inscriptions of affecting simplicity, both written by himself. The first runs thus: "John Marshall, son of Thomas and Mary Marshall, was born the 24th of September, 1755. Intermarried with Mary Willis Ambler, the 3d of January, 1783. Departed this life the [6th] day of July, 1835." The second thus: "Sacred to the memory of Mrs. Mary Willis Marshall, Consort of John Marshall. Born the 18th of March, 1766. Departed this life the 25th of December, 1831. This stone is devoted to

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<sup>1</sup> Many a "severe contusion" must he have suffered in those primitive days, from upsets and joltings, in driving every year between Richmond and Washington, some one hundred and twenty miles each way; from Richmond to Raleigh and back, in attending his North Carolina Circuit, about one hundred and seventy-five miles each way; and between Richmond and Oakhill, his country place, every summer, about one hundred miles each way.

her memory by him who best knew her worth, and most deplores her loss."

Marshall's accession to the bench was marked by an impressive circumstance. For ten years or more he alone gave all the opinions of the court to which any name was attached, except where the case came up from his own circuit, or where for any reason he did not sit. In the very few cases where opinions were given by the other justices, they were given in the old way, *seriatim*, as they were usually given before Marshall came in, and as they were given in contemporary English courts. Whatever may have been the purpose of the Chief Justice in introducing this usage, there can be no doubt as to the impression it was calculated to produce. It seemed, all of a sudden, to give to the judicial department a unity like that of the executive, to concentrate the whole force of that department in its chief, and to reduce the side justices to a sort of cabinet advisers. In the very few early cases where there was expressed dissent, it lost much of its impressiveness when announced, as it sometimes was, by the mouth that gave the opinions of the court.

In 1812, when a change took place, the court had been for a year without a quorum. Moreover, Judge Story had just come to the bench, a man of quite too exuberant an intellect and temperament to work well as a silent side judge. We remark, also, at the beginning of that term, that the Chief Justice was not in attendance, having, as the reporter tells us, "received an injury by the over-setting of the stage-coach on his journey from Richmond." And it may be added that just at this time the anxious prayer of Jefferson was answered, and a majority of the judges were Republicans. From whatever cause,

henceforward there was a change; and, without returning to the old habit of *seriatim* opinions, the side judges had their turn, as they do now.

In coming to consider Marshall's judicial work, as before, in dealing with the personal side of him, I pass over much of what presses to be said; for I must not, on this occasion, transgress materially that little compass of an hour, which prudence, and usage, and the convenience of my hearers, on this busy day, prescribe. A few things only can be said, and these such as are not too technical and detailed to be quite unfit for your hearing to-day.

In most of Marshall's opinions, one observes the style and the special touch of a thoughtful and original mind; in some of them the powers of a great mind in full activity. His opinions relating to international law, as I am assured by those competent to judge, rank with the best there are in the books. As regards most of the more familiar titles of the law, it would be too much to claim for him the very first rank. In that region he is, in many respects, equaled or surpassed by men of greater learning, more deeply saturated with the technicalities of the law, with that "artificial perfection of reason" of which Coke used to talk, as surpassing so much the reason of any one man,—men such as Story, Kent, or Shaw, or the reformer Mansfield, whom Marshall greatly admired, Eldon, Westbury, or Blackburn. But in the field of constitutional law, and especially in one department of it, that relating to the National Constitution, he was pre-eminent,—first, with no one second. It is hardly possible, as regards this part of the law, to say too much of the service he rendered to his country. Sitting in the highest judicial place for more than a generation; famil-

iar from the beginning with the Federal Constitution, with the purposes of its framers, and with all the objections of its critics; accustomed to meet these objections from the time he had served in the Virginia Convention of 1788; convinced of the purpose and capacity of this instrument to create a strong nation, one competent to make itself respected at home and abroad, and able to speak with the voice and to strike with the strength of all; assured that this was the paramount necessity of the country, and that the great source of danger was in the jealousies and adverse interests of the States,— Marshall acted on his convictions. He determined to give full effect to all the affirmative contributions of power that went to make up a great and efficient National Government; and fully, also, to enforce the national restraints and prohibitions upon the States. In both cases he included not only the powers expressed in the Constitution, but those also which should be found, as time unfolded, to be fairly and clearly implied in the objects for which the Federal Government was established. In that long judicial life with which Providence blessed him, and blessed his country, he was able to lay down, in a succession of cases, the fundamental considerations which fix and govern the relative functions of the Nation and the States, so plainly, with such fullness, such simplicity and strength of argument, such a candid allowance for all that was to be said upon the other side, in a tone so removed from controversial bitterness, so natural and fit for a great man addressing the “serene reason” of mankind,—as to commend these things to the minds of his countrymen, and firmly to fix them in the jurisprudence of the nation; so that “when the rain descended and the floods came,

and the winds blew and beat upon that house, it fell not, because it was founded upon a rock."

It was Marshall's strong constitutional doctrine, explained in detail, elaborated, powerfully argued, over and over again, with unsurpassable earnestness and force placed permanently in our judicial records, holding its own during the long emergence of a feebler political theory, and showing itself in all its majesty when war and civil dissension came,— it was largely this that saved the country from succumbing, in the great struggle of forty years ago, and kept our political fabric from going to pieces. I do not forget our own Webster, or others, in saying that to Marshall (if we may use his own phrase about Washington), "more than to any other individual, and as much as to one individual was possible," do we owe that prevalence of sound constitutional opinion and doctrine that held the Union together; to that combination in him, of a great statesman's sagacity, a great lawyer's lucid exposition and persuasive reasoning, a great man's candor and breadth of view, and that judicial authority on the bench, allowed naturally and as of right to a large, sweet nature, which all men loved and trusted, and capable of harmonizing differences and securing the largest possible amount of co-operation among discordant associates. In a very great degree, it was Marshall, and these things in him, that have wrought out for us a strong and great nation, one that men can love and die for; that "mother of a mighty race," which stirred the soul of Bryant half a century ago, as he dreamed how,

"The thronging years in glory rise,  
And as they fleet,  
Drop strength and riches at thy feet;"

the nation whose image flamed in the heart of Lowell, a generation since, as he greeted her coming up out of the Valley of the Shadow of Death:

"Oh Beautiful, my country, ours once more! . . .  
Among the nations bright beyond compare! . . .  
What were our lives without thee?  
What all our lives to save thee?  
We reck not what we gave thee,  
We will not dare to doubt thee,  
But ask whatever else, and we will dare!"

It fell, for the first time, to the Supreme Court, early in Marshall's day, to take the grave step of disregarding an Act of Congress,— a co-ordinate department,— which conflicted with the National Constitution. Had the question related to a conflict between that Constitution and the enactment of a State, it would have been a simpler matter. These two questions, under European written constitutions, are regarded as different ones. It is almost necessary to the working of a federal system that the general government, and any of its departments, should be free to disregard acts of any department of the local States which may be inconsistent with the Federal Constitution. And so in Switzerland and Germany the federal courts thus treat local enactments. But there is not, under any written constitution in Europe, a country where the court deals in this way with the act of its co-ordinate legislature. In Germany, at one time, this was done, under the influence of a study of our law, but it was soon abandoned.

I must omit, very reluctantly, the historical considerations relating to this great question; the theory and the usage under our colonial charters, which prepared our people for the peculiar doctrine which we hold; the debates and the differences of opinion about it in our early

conventions and elsewhere; the various contrivances for meeting this danger of unconstitutional legislation which were discussed; the early practices of our Federal Executive as to asking opinions of the judges, and, on their part, of communicating such opinions, informally and privately, to the Executive, so that he might see to it that the fundamental law was faithfully executed; these and other such matters I must, at present, pass by.

It was in 1803, when Marshall had been two years Chief Justice, that the great case above referred to, that of *Marbury v. Madison*, came up for final decision. It has been said in high quarters that there were earlier decisions of the Supreme Court holding an Act of Congress unconstitutional; but nothing yet in print justifies the statement. This was the first case. And it was more than half a century before such a decision was again rendered by this court.

*Marbury v. Madison* was a remarkable case. It was intimately connected with certain executive action for which Marshall, as Secretary of State, was partly responsible. For various reasons, the case must have excited a peculiar interest in his mind. Within less than three weeks before the end of Adams's administration, on February 13, 1801, while Marshall was both Chief Justice and Secretary of State, an Act of Congress had abolished the old system of Circuit and District Courts, and established a new one. This gave to the President the appointment of many new judges, and kept him and his secretary busy, during the last hours of the administration, in choosing and commissioning the new officials. And another thing. The Supreme Court had consisted heretofore of six judges. This same Act provided that after the next vacancy on the bench, there should be five

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judges only. Such arrangements as these, made by a party just going out of power, were not ill calculated to create, in the mind of a party coming in, the impression of an intention to keep control of the judiciary as long as possible. There were, to be sure, other reasons for some of this action. Several judges had signified to Washington, in 1790, the opinion that the Judiciary Act of 1789 was unconstitutional in making them judges of the Circuit Court. The new statute corrected that. Yet in regard to the time chosen for this action, it was observable that ten years and more had been suffered to elapse before the mischief then pointed out by the judges was corrected.

Another matter relating to the Supreme Court had been dealt with. This Act of February 13, 1801, provided that the two terms of the court, instead of being held, as hitherto, in February and August, should thereafter be held in June and December. Accordingly, the court sat in December, 1801. It adjourned, as it imagined, to June, 1802. But on March 8th of that year, Congress, under the new administration, repealed the law of 1801, unseated all the new judges, and reinstated the old system, with its August and February terms. And then, a little later in the year, the August term of the court was abolished; leaving only one term a year, to begin on the first Monday in February. Thus, since the June term was abolished, and February had then passed, and there was no longer a December or an August term, the court found itself, in effect, adjourned by Congress from December, 1801, to February, 1803; and it had no session at all during the whole of the year 1802.

If the legislation of 1801 was calculated to show the importance attached by an outgoing political party to

control over the judiciary, that of 1802 was well adapted to show how entirely the incoming party agreed with them and how well inclined they were to profit by their own opportunities. How was it, meantime, with the judiciary itself? Unfortunately, the Supreme Court had already been drawn into the quarrel. For, at the single December term, in 1801, held under the statute of that year, an application had been made to the court by four persons in the District of Columbia, for a rule upon James Madison, Secretary of State, to show cause why a writ of mandamus should not issue requiring him to deliver to these persons certain commissions as Justice of the Peace, which had been left in Marshall's office, undelivered, at the time when he ceased to add to his present functions those of Secretary of State. They had been made out, sealed, and signed, and were supposed to have been found by Madison when he came into office, and to be now withheld by him. This motion was pending when the court adjourned, in December, 1801. Of course, such a motion as that,— for a mandamus to the head of the Cabinet,— must have attracted no little attention on the part of the new administration and its supporters. Abolishing the August term postponed any early action by the court; and was calculated to remind the judiciary very forcibly of the power of the Legislature. At last the court came together, in February, 1803, and found the mandamus case awaiting its action. It is the first one reported at that term. Since Marshall had taken his seat, there had been only five reported cases before this one. The opinions had all been given by Marshall himself unless a few lines "by the court" may be an exception; and according to the new custom by which the Chief Justice became, wherever it was possible, the sole organ of the court, Marshall

now gave the opinion in *Marbury v. Madison*. It may reasonably be wondered that he should have been willing to give the opinion in such a case; and especially that he should have handled the case as he did. But he was sometimes curiously regardless of conventions.

What was decided in *Marbury v. Madison*, and all that was decided, was that the court had no jurisdiction; and that a statute purporting to confer on it power to issue a writ of mandamus in the exercise of original jurisdiction was unconstitutional. It is the decision upon this point that makes the case famous; and undoubtedly it was reached in the legitimate exercise of the court's power. But, unfortunately, instead of proceeding in the usual way, the opinion began by passing upon all the points which the denial of its own jurisdiction took from it the right to treat. It was thus elaborately laid down, in about twenty pages, out of the total twenty-seven which comprise the opinion, that Madison had no right to detain the commissions which Marshall had left in his office; and that mandamus would be the proper remedy in any court which had jurisdiction to grant it.

Thus, as the court, by its decision, was reminding the Legislature of its limitations, so also, and by this irregular method, it intimated to the Executive department its amenability to judicial control; and two birds were neatly reached with the same stone. Marshall made a very noticeable remark in this opinion, seeming to point to the Chief Executive himself, and not merely to his Secretary, when he said, "It is not the office of the person to whom the writ is directed, but the nature of the thing to be done, by which the propriety or impropriety of issuing the mandamus is to be determined,"—a hint

that on an appropriate occasion the judiciary might issue its orders personally to him. This remark gets illustration by what happened a few years later, in 1807, when the Chief Justice, at the trial of Aaron Burr in Richmond, ordered a subpoena to the same President, Thomas Jefferson, directing him to bring thither certain documents. It was a strange conception of the relations of the different departments of the Government to each other, to imagine that an order, with a penalty, was a legitimate judicial mode of addressing the Chief Executive. On Jefferson's part this order was received with the utmost discontent. He had a serious apprehension of a purpose to arrest him by force, and was prepared to protect himself. Meantime he sent to the United States Attorney at Richmond the papers called for; but explained, with dignity, that while the Executive was willing to testify in Washington, it could not allow itself to be "withdrawn from its station by any co-ordinate authority."

It was partly to the same tendency on Marshall's part, already mentioned, to give little thought to ordinary conventions, and partly to his kindness of heart, that we should attribute another singular occurrence, the fact that he attended a dinner at the house of an old friend, Wickham, one of Burr's counsel, when he knew that Burr was to be present; and when that individual, having previously been brought to Richmond under arrest, examined before Marshall and admitted to bail, was still awaiting the action of the grand jury with reference to further judicial proceedings before Marshall himself. Marshall had accepted the invitation before he knew that Burr was to be of the company. I have been informed by one of his descendants that his wife advised

him not to go; but he thought it best not to seem too fastidious, or to appear to censure his friend, by staying away. It is said that he sat at the opposite end of the table, had no communication with Burr, and went away early. But we must still wonder at his action; and he himself, it is said, afterwards much regretted it.

Marshall's leading constitutional opinions may be divided into three classes: *First*, such as discuss the general character and reach of the Federal Constitution, and the relation of the Federal Government to the States. Of this class, *McCulloch v. Maryland*, probably his greatest opinion, is the chief illustration. *Second*, those cases which are concerned with the specific restraints and limitations upon the States, imposed by the Federal Constitution. To this class may be assigned *Fletcher v. Peck*, the bankruptcy cases of *Sturges v. Crowninshield* and *Ogden v. Saunders*, and *Dartmouth College v. Woodward*. *Third*, such as deal with the general theory and principles of constitutional law. There is little of this sort. Except as it is incidentally touched, perhaps the only case is *Marbury v. Madison*.

I cannot now speak of these cases in detail; only on one or two of them is there time to comment at all. If we regard at once the greatness of the questions at issue in the particular case, the influence of the opinion, and the large method and clear and skilful manner in which it is worked out, there is nothing so fine as the opinion in *McCulloch v. Maryland*. The questions were, first, whether the United States could constitutionally incorporate a bank; and second, if it could, whether a State might tax the operations of the bank; as, in this instance, by requiring it to use stamped paper for its notes. The bank was

sustained and the tax condemned. In working this out, it was laid down that while the United States is merely a government of enumerated powers, and these do not in terms include the granting of an incorporation, yet it is a government whose powers, though limited in number, are, in general, supreme, and also adequate to the great national purposes for which they are given; that these great purposes carry with them the power of adopting such means, not prohibited by the Constitution, as are fairly conducive to the end; and that incorporating a bank is not forbidden, and is useful for several ends. Further, the paramount relation of the National Government, whose valid laws the Constitution makes the supreme law of the land, forbids the States to tax or to "retard, impede, burden or in any manner control" the operations of the Government in any of its instrumentalities. The opinion was that of a unanimous court, in which five out of the seven judges had been nominated by a Republican President.

As regards the third class of cases mentioned just now, that which deals with the fundamental conceptions and theory of our American doctrine of constitutional law, *Marbury v. Madison*, as I said, is the chief case. I have purposely delayed until this point any reference to this aspect of the case. While this, historically, is what gives the case its chief importance, yet it occupies only about a quarter of the opinion. In outline, the argument is as follows: The question is whether a court can give effect to an unconstitutional act of the Legislature. This is answered, as having little difficulty, by referring to a few "principles long and well established." 1. The people, in establishing a written Constitution and limiting the powers of the Legislature, intend to control it; else

the Legislature could change the Constitution by an ordinary act. 2. If a superior law is not thus changeable, then an unconstitutional act is not law. This theory, it is added, is essentially attached to a written constitution. 3. If the act is void, it cannot bind the court. The court has to say what the law is, and in saying this must judge between the Constitution and the act. Otherwise, a void act would be obligatory; and this would be saying that constitutional limits upon legislation may be transgressed by the Legislature at pleasure, and thus these limits would be reduced to nothing. 4. The language of the instrument gives judicial power in "cases arising under the Constitution." Judges are thus in terms referred to the Constitution; they are required by the Constitution to be sworn to support it, and cannot violate it. And so, it is said in conclusion, the peculiar phraseology of the instrument confirms what is supposed to be essential to all written constitutions, that a law repugnant to it is void, and that the courts, as well as other departments, are bound by it.

This reasoning is mainly that of Hamilton, in his short essay of a few years before, in the "Federalist." It answered the purpose of the case in hand; but this short and dry treatment of the subject, as being one of no real difficulty, is in sharp contrast with the protracted reasoning of *McCulloch v. Maryland*, *Cohens v. Virginia*, and other great cases; and it is much to be regretted. Absolutely settled as the general doctrine is to-day, and sound as it is when regarded as a doctrine for the descendants of British colonists, there are grave and far-reaching considerations, not touched by Marshall, which affect to-day the proper administration of this extremely important power, and must have commanded his atten-

tion, if the subject had been deeply considered and fully expounded. His reasoning does not answer the difficulties that troubled Swift, afterwards Chief Justice of Connecticut, and Gibson, afterwards Chief Justice of Pennsylvania, and many another strong man; not to mention Jefferson's familiar and often ill-digested objections. It assumes as an essential feature of a written constitution what does not exist in any one of the written constitutions of Europe. It does not remark the grave distinction between the power of a Federal court in disregarding the acts of a co-ordinate department, and in dealing thus with the legislation of the local states; a distinction important in itself, and observed under the written constitutions of Europe, which, as I have said, allow this power in the last sort of case, while denying it in the other.

Had Marshall dealt with this subject after the fashion of his greatest opinions, he must also have passed upon certain serious suggestions arising out of the arrangements of our own constitutions and the exigencies of the other departments. All the departments, and not merely the courts, are sworn to support the Constitution. All are bound to decide for themselves, in the first instance, what this instrument requires of them. None can have help from the courts unless, in course of time, some litigated case should arise; and of some questions it is true that they never can arise in the way of litigation. What was Andrew Johnson to do when the Reconstruction Acts in 1867 had been passed over his veto by the constitutional majority, while his veto had gone on the express ground that they were unconstitutional? He had sworn to support the Constitution. Should he put in force a law which was contrary to the Constitution, or



should he say, as he did say to the court, through his Attorney-General, "I recognize no duty now except faithfully to carry out and execute the law?" And why is he to say this?

Again, what is the House of Representatives to do when a treaty duly made and ratified by the constitutional authority, namely, the President and Senate, comes before it for an appropriation of money to carry it out? Has the House, under these circumstances, anything to do with the question of constitutionality? If it thinks the treaty unconstitutional, can it vote to carry it out? If it can, how is this justified?

Is the situation necessarily different when a court is asked to enforce a legislative act? The courts are not strangers to the case of political questions, where they refuse to interfere with the action of the other departments, as in the case relating to Andrew Johnson just referred to; and to the need of dealing with what are construed to be merely directory provisions of the Constitution; and to the cases, well approved in the Supreme Court of the United States, where they refuse to consider whether provisions of the Constitution have been complied with, requiring certain formalities in passing laws,—and where they accept as final the certificate of the officers of the political departments. A question, passed upon by those departments, is thus refused any discussion in the judicial forum on the ground, to quote the language of the Supreme Court, that "the respect due to co-equal and independent departments requires the judicial department to act upon this assurance."

So far as any *necessary* conclusion is concerned, it might fairly have been said with us, as it is said in Europe, that the real question in all these cases is not whether the act

is constitutional, but whether its constitutionality can properly be brought in question before a given tribunal.

I have drawn your attention to the immense services that Chief Justice Marshall rendered to his country in the field of constitutional law, and have considered a few of the cases.

Since his time not twice the length of his term of thirty-four years has gone by, but five times the number of volumes that sufficed for the opinions of the Supreme Court during his period will not hold those of his successors on that bench. Nor does even that proportion approximate the increase in the quantity of the court's business which is referable to this particular part of the law. This has enormously increased. When one reflects upon the multitude, variety, and complexity of questions relating to the regulation of interstate commerce; upon the portentous and ever-increasing flood of litigation to which the Fourteenth Amendment has given rise; upon the new problems in business, government, and police which have come in with steam and electricity, and their ten thousand applications; upon the growth of corporations and of wealth; the changes of opinion on social questions, such as the relations of capital and labor; and upon the recent expansions of our control over great and distant islands, we seem to be living in a different world from Marshall's. Under these strange, new circumstances what is happening in the region of constitutional law? Very serious things indeed.

The people of the States, in making new constitutions, have long been adding more and more prohibitions and restraints upon their Legislatures. The courts, meantime, often enter into the harvest thus provided for them

with a light heart, and promptly and easily proceed to set aside acts of the Legislatures. The Legislatures grow accustomed to this distrust, and more and more readily incline to justify it, and to shed all consideration of constitutional restraints,—as concerning the exact extent of these restraints,—turning that subject over to the courts; and, what is worse, they fall into a habit of assuming that whatever they can constitutionally do, they may do,—as if honor and fair dealing and common honesty were not relevant to their inquiries. The people all this while grow careless as to whom they send to the Legislature; they cheerfully vote for men whom they would not trust with an important private affair, and if these unfit persons pass foolish and bad laws, and the courts step in and freely disregard them, the people are glad that these few, wiser gentlemen on the bench, are there to protect them against their more immediate representatives.

From these causes there has developed a vast and growing increase of judicial interference with legislation. This is a very different state of things from what our fathers contemplated, a century and more ago, in framing the new system. Seldom, indeed, as they imagined, would this great, novel, tremendous power of the courts be exerted,—would this sacred ark of the covenant be taken from within the veil. Marshall himself expressed truly one aspect of the matter, when he said in one of the later years of his life, “No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of legislative acts. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other grounds, a just respect for the Legis-

lature requires that the obligation of its laws should not be unnecessarily and wantonly assailed."

And again, a little earlier than this, he laid down the one true rule of duty for the courts. When he went to Philadelphia in 1831, on that painful errand of which I have spoken, in answering a cordial tribute from the bar of that city, he remarked that if he might be permitted to claim for himself and his associates any part of the kind things they had said, it would be this: that they had "never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the full extent that duty required."

That is the safe twofold rule; nor is the first part of it any whit less important than the second; nay, more, to-day it is the part which most requires to be emphasized. For just here comes in a consideration of very great weight. Great, and indeed inestimable, as are the advantages in a popular government of this conservative influence,—the power of the judiciary to disregard unconstitutional legislation,—it should be remembered that the exercise of it, even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people lose the political experience and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors. If the decisions in *Munn v. Illinois*, and the Granger cases, twenty-five years ago, and in the Legal Tender cases, nearly thirty years ago, had been different; and the legislation there in question, thought by many to be unconstitutional and by many more to be ill-advised, had been set aside, we should have been saved some trouble and some harm. But I venture to think that the good which

came to the country and its people from the vigorous thinking that had to be done in the political debates that followed, the infiltration through every part of the population of sound ideas and sentiments, the rousing into activity of opposing elements, the enlargement of ideas, the strengthening of moral fibre, and the growth of political experience which came out of it all,—far more than outweighed any evil which ever flowed from the refusal of the court to interfere with the work of the Legislature.

The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that.

What should be done? It is the courts that can do most to cure the evil; and their opportunity is a very great one. Let them adhere to first principles, and consider how narrow is the function which the constitutions have conferred on them,—the office merely of deciding litigated cases. How large, therefore, is the duty entrusted to others, and above all to the Legislature. It is this body which is charged, primarily, with the duty of judging of the constitutionality of its work. The constitutions, generally, give them no authority to call upon a court for advice; they decide for themselves, and the courts, owing to their limited function, may never be able to say a word. Such a body, charged, in every State, with almost all the legislative power of the people, is entitled to the most entire and real respect; is entitled, as among all rationally permissible opinions as to what the Constitution allows, to its own choice. Courts, as has often been said, are not to think of the legislators

but of the Legislature, the great, continuous body itself, abstracted from all the transitory individuals who may happen to hold its power at a particular time. It is this majestic representative of the people whose action is in question,— a co-ordinate department of the Government, charged with the greatest functions, and invested, in contemplation of law, with all the wisdom, virtue, and knowledge that the exercise of such functions requires.

To set aside the acts of such a body, representing in its own field, (the very highest of all), the ultimate sovereign, should be a solemn, unusual, and painful act. Something is wrong when it can ever be other than that. And if it be true that the holders of legislative power are careless or evil, the constitutional duty of the court remains wholly untouched; it cannot rightly undertake to protect the people by attempting a function not its own. On the other hand, by adhering to its own place a court may help, as nothing else can, to fix the spot where responsibility rests, viz., on the careless and reckless legislators, and to bring down on that precise locality the thunderbolt of popular condemnation. The judiciary, to-day, in dealing with the acts of co-ordinate legislatures, owes to the country no greater or clearer duty than that of keeping its hands off these acts wherever it is possible to do it. That course,— the true course of judicial duty always,— will powerfully help to bring the people and their representatives to a sense of their own responsibility.

There will still remain to the judiciary an ample field for the determinations of this remarkable jurisdiction, of which our American law has so much reason to be proud,— a jurisdiction which has had some of its chief illustrations and its greatest triumphs, as in Marshall's time, so in ours, while the courts were refusing to exert it.

And now I must stop. I have tried, however imperfectly, to give some picture of the singularly attractive personality of the great man whom we commemorate, some intimation of his remarkable qualities and achievements as a judge, some comment, and even some criticism here and there, some reflections upon the present aspects of that great subject in which he was most distinguished, and some forecast of what is to be desired and hoped for in that field.

Poor indeed must my efforts have been if they do not leave in your minds a feeling of affectionate reverence for Chief Justice Marshall, of admiration for his surpassing powers and his patriotic devotion of them to the service of his country, of gratitude to the Almighty Father of nations and of men that such a life, such a character, and such gifts were vouchsafed to our country in its early days, and of devout trust that as God has been to our fathers, so he will be to us, and to our children, and our children's children.

PROCEEDINGS AT THE DINNER GIVEN AT THE NEW  
ALGONQUIN CLUB UNDER THE AUSPICES OF  
THE BOSTON BAR ASSOCIATION.

Introductory Remarks of John C. Gray, President of the  
Boston Bar Association, at the Dinner given at the  
Algonquin Club.

I have two telegrams which I wish to read. The first is from Mr. Beverly B. Munford, the Chairman of the Joint Committee of the State of Virginia and of the Richmond City Bar Association: "Virginia sends her first greetings to Massachusetts on this centennial anniversary. All

honor to Marshall, the great Chief Justice, and to Massachusetts who called him to the bench." (Applause.)

I have another telegram from the coming city of the country — Chicago! "Illinois sends greeting to Massachusetts. The American bench and bar are united in one common brotherhood on this historic day." (Applause.)

Brethren, there has been so much eloquence to-day about Chief Justice Marshall, and we hope that there will be so much more, that I have but one word to say, and that, I think, is a word appropriate to this occasion. Chief Justice Marshall was a star of the first magnitude, but he was one of a constellation. Great bars make great judges. Chief Justice Marshall would never have reached his eminence alone, nor if his early legal associates had been a company of ignorant and pettifogging attorneys. He was a member of a bar which has had no superior in ability and no equal in learning, and the bar of Virginia may take to itself a considerable portion of the praise which is the just due of the great Chief Justice.

We are fortunate here to-night in having an eminent member of the bar of Virginia with us. As with us, so with them, the profession is apt to be hereditary. For four generations the family of our distinguished guest has furnished eminent lawyers to the bar of Virginia, and it gives me a particularly personal pleasure to say that for four generations they have furnished eminent professors of law. Gentlemen, let me introduce to you the Hon. Henry St. George Tucker, of Virginia. (Loud applause, the members of the Association rising to their feet.)

**Address of Professor Tucker.**

The interest which this occasion inspires is enhanced no little by the reflection that on this day, throughout the



length and breadth of the land, courts of justice are closed to litigants, commerce and trade partially suspended, and the association of lawyers in forty-five States of the Union, as well as schools devoted to instruction in the science of the law, have temporarily laid aside their daily routine, to unite in doing honor to the memory of the great Chief Justice. The partiality of your committee, to which I owe the privilege, as a son of Virginia, of uniting with this goodly fellowship of kindred spirits of the ancient Commonwealth of Massachusetts in the celebration of this day, will always be cherished by me as among the most pleasing compliments of my life. The renewal of the ties of friendship between the two States of Virginia and Massachusetts can be no less happy in its results than the study and exaltation of the life and character of the great man whose memory we meet to honor.

Diversity of race, of institutions, of modes of life, of habits of thought, and of political ambitions have in the years gone by often brought them into serious and dangerous antagonism; but the mutual respect of each for the other in the sturdy maintenance of its peculiar views has been steadfastly maintained and rarely questioned, even by the most extreme, in the time of hottest conflict. Nor should it be forgotten that when by the act of 8th George III. the power to legislate in all cases for the colonies by Parliament was asserted, followed by the passage of the Boston Port Bill, these bills were communicated to the Assembly of Virginia, their indignant protest was entered at once against them, and that, though dissolved by Lord Dunmore, and prevented from further action by him in their official capacity, the members of that body at once assembled as individuals in the

long room at the Raleigh Tavern in the city of Williamsburg, unawed by official despotism, and adopted those resolutions never to be forgotten by the sons of these two great Commonwealths,—“ We are, farther, clearly of the opinion that an attack made on *one* of our sister-colonies to compel submission to arbitrary taxes is an attack made on all British America, and threatens ruin to the rights of all, unless the united wisdom of the whole be applied.” May we not pause to express the hope that the spirit of these resolutions may be the future spirit of the States of this great Union, that the threatened blow of arbitrary power at any one of them from foreign or domestic foe may unite the hearts of all to defend the one, as part of the whole?

Judge Marshall’s judicial reputation can safely be left in the masterful opinions which filled our reports for more than a third of a century, and will remain unimpaired after the musty volumes which contain them have fallen to dust. In logical power and power of analysis they have certainly never been excelled, and it may well be doubted if they have ever been equaled on any bench.

It is my purpose to ask you to turn for a moment with me this evening from a consideration of John Marshall the judge, to that of John Marshall the citizen; and I do this the more readily because of the ample vindication which his judicial career has received this day at the hands of our distinguished brother Thayer, of Harvard University.

At an early period of Virginia’s history, at Turkey Island, a plantation some fifteen or twenty miles from the city of Richmond, near the scene of the terrific battle of Malvern Hill, lived the Virginia planter, William Randolph. He was the ancestor of all of that name in Vir-

ginia, and from him descended, in direct line, Thomas Jefferson, John Marshall, and Robert E. Lee,—a triumvirate of civic, judicial and military power. Sprung from a distinguished lineage, trained in a school where the amenities of life as well as “the humanities” were taught in their highest excellence, John Marshall practiced from his earliest childhood a scrupulous regard for the rights and feelings of others and an indulgence to all faults except his own.

With a self-control and equipoise which were rarely disturbed under the most trying circumstances, and a graciousness of manner which broke down all barriers, giving to the humblest as well as to the highest the assurance of his friendly consideration, and a mind well-disciplined by education in the highest schools and under the tutelage of his father, a man of superior education and intelligence, it was impossible that he could have been other than a man of mark and influence in his State.

Would it be claiming too much to say that John Marshall, *the citizen*, was the natural product of the civilization existing in Virginia during his boyhood and manhood,—a civilization which, alas, except here and there in certain localities, is fast passing away. The home, not the club, was its centre; the family, its unit. The father was the *head* of the family, not the joint-tenant with the wife of a house, nor the tenant-at-will of his wife. The wife and the mother was the queen of the household, not merely a housekeeper for a husband and family. Obedience to those in authority was the first lesson exacted of the boy. Inculcated with tenderness, it was enforced with severity if need be, until the word of the father or the expressed wish of the mother carried

with it the force of law as completely as the decree of a court or the mandate of a king.

Reverence for superiors in age and deference to all, rather than an arrogant self-assertion, were magnified as cardinal virtues; not as teaching humility and enforcing a lack of proper self-respect, but rather to exalt high ideals and stimulate an admiration for "the true, the beautiful, and the good."

Fidelity to truth; the maintenance of personal honor; deference to the opinions and feelings of others, without abating one's own or aggressively thrusting them on others; a kindliness of manner to dependants; a knightly courtesy to all, but with special and tender regard in thought, word and action toward woman,—were in turn patiently taught in all the lessons of the fireside and at the family altar, and earnestly insisted upon in the formation of the character of a true gentleman. "Any man will be polite to a beautiful young woman, but it takes a gentleman to show the same respect to a homely old woman," was the stinging rebuke of a father to his son who failed to remove his hat in passing a forlorn old woman on a public highway in Virginia.

The old field school, the private tutor, the high school, the college, led the young mind by easy stages to its full intellectual maturity.

Nowhere was the principle "*sana mens in sano corpore*" more scrupulously taught than in Virginia. The rod and stream, the gun, the "hounds and horn," the chase with the music of the pack, the bounding steed, all lent their ready aid in developing the physical manhood of the boy. In the pure atmosphere of his country home, amid its broad fields and virgin forests, contracted houses in narrow streets had no charms for him. To

join the chase was the first promotion to which the boy looked as evidencing his permanent release from the nursery, and gun and dog became his constant companions. Skill in horsemanship was essential, and breaking colts was naturally followed by broken limbs; but manhood found a race of trained horsemen, both graceful and skilful in the saddle, unexcelled, I dare venture to assert, by any civilized people. A child of nature, the Virginia boy communed with her as his mother, and from her purest depths drew the richest inspirations. To him no mountains were so blue as hers, no streams so clear, no forests so enchanting, no homes so sweet.

Religion, the duty of man to his Creator — not sectarianism — was scrupulously taught, and Sunday morning found the family alive in preparations for attending religious service at Zion or Trinity, as it might happen to be the first or the fourth Sunday of the month. From this duty none were exempt, from the least to the greatest. The pastor was the friend on whom all troubles, temporal and spiritual, were cast, and his visits were long remembered and talked of in the life of each family. Deference to his wishes and reverence for his character were wellnigh universal.

"A man he was to all the country dear,  
And passing rich with forty pounds a year;  
Remote from towns he ran his godly race,  
Nor e'er had changed, nor wished to change, his place."

Such was the atmosphere in which John Marshall was reared and by which he was surrounded when at nineteen years of age he enlisted for the War of Independence under the magic influence of Henry's fiery eloquence.

We cannot trace his record as a soldier throughout that great struggle. Suffice it to say that, entering the army as a lieutenant, he left it as a captain, and during the whole course of the war displayed the highest qualities of a soldier; and surely it is not without interest to remember that the hand which penned the weighty judgment of the court in *McCulloch v. The State of Maryland* cut the firewood with the axe for the campfire of the soldier, and that the feet which bore him to the judgment hall to deliver the marvelous opinion in *Gibbons v. Ogden* had reddened the snow at Valley Forge with the patriotic blood of the soldier.

At the age of twenty-six he became a member of the Legislature of Virginia, and lent the aid of his mighty mind to settling the intricate problems which arose out of that disturbed period. Let his own words tell of his sentiments at this date: "When I recollect the wild and enthusiastic notions with which my political opinions of that day were tinged, I am disposed to ascribe my devotion to the Union, and to a government competent to its preservation, at least as much to casual circumstances as to judgment. I had grown up at a time when the love of the Union and the resistance to the claims of Great Britain were the inseparable inmates of the same bosom; when patriotism and a strong fellow-feeling with our fellow-citizens of Boston were identical; when the maxim, 'United we stand, divided we fall,' was the maxim of every orthodox American. And I had imbibed these sentiments so thoroughly that they constituted a part of my being. I carried them with me into the army, where I found myself associated with brave men from different States, who were risking life and everything valuable in a common cause, believed by all to be most

precious, and where I was in the habit of considering America as my country and Congress as my government."

Among the questions which called forth his deepest interest at this time was the necessity for making immediate provision for the payment of the officers and soldiers of the disbanded army; and so loyal was he to their interests, that ever after they were his fast and devoted friends. He represented his native county of Fauquier, and subsequently his adopted county of Henrico, in the Legislature.

As a lawyer he was ever faithful to the interests of his clients, and from the very beginning of his career was recognized as a man of great ability in his chosen profession. His argument in the case of *Ware v. Hylton* in the Federal court in Richmond produced a profound impression, and was only excelled, perhaps, in the effectiveness of the argument by his great speech in the *Jonathan Robbins* case in the House of Representatives.

I purpose, however, to confine my remarks to two occasions in Judge Marshall's life which afforded him special opportunities for exhibiting his vast powers for the benefit of his people; and to attempt, in a brief form, a sketch of the Virginia Convention of 1788, called to ratify the Federal Constitution, and of the Virginia Convention of 1829-30, called to change the Constitution of the State, in both of which he took a prominent part,—two bodies which, were I not standing on the soil of Massachusetts, I should be tempted to affirm had never been surpassed on this continent in the ability and broad patriotism of their members.

Monday, June 2, 1788, found the little city of Richmond on the James all astir. The streets for that day

were crowded with eager men hastening toward the capitol; handsome equipages laden with Virginia's fairest daughters lined the main thoroughfares leading to the city. A stranger standing on one of the hills of the city looking in any direction would have noticed clouds of dust rising in the distance from the country roads. The roads, not railroads, leading into Richmond were lined with travelers approaching the city, some in gigs, some in phaëtons, and many on horseback with saddlebags as their saratogas. Nor were they only those who expected to participate in the proceedings of the Convention. Distinguished strangers from other States; planters from every portion of the Commonwealth,— statesmen though planters; while the ambitious youth from its remotest corners was eagerly hastening to the scene to witness the most gigantic struggle in the history of the Old Dominion. Comely maidens and stately matrons, whose grace had lent its charms to many official functions in the ancient capitol, formed a bouquet of rarest fragrance, and diffused its brilliancy over the gathered assembly. Many members arrived late Sunday evening, and they continued to come until the hour of assembling on the next day at twelve. The steam-engine brought none to the city; the trolley lines that now pierce the centers of commerce and population were unpopular in those days; while the delegates from beyond the Blue Ridge on horseback would scarcely dare to scale the mountains in the ample and comfortable carriage used for neighborhood purposes. Nor was the bicycle or the automobile used as a mode of conveyance by members, and the picture of Chancellor Wythe or of the venerable Pendleton arriving at the capitol in an automobile is one that the wildest imagination is unable to draw. Patrick Henry



in his gig, Pendleton in his phaëton and others on horse-back traveled the dusty roads and across broad streams after many days of wearisome journey, to take part in the deliberations of this great body.

In their elevated character and the loftiness of their patriotism, it is no disparagement to claim that the Convention about to assemble was not inferior to that which adopted the instrument now presented for their consideration. Pendleton, the President of the Court of Appeals, and Wythe, the venerable Chancellor and teacher of the law, who, with patient skill, had laid deep the foundations of learning in the minds of Marshall, Randolph, and others, were fit representatives of the ancient glory of the Commonwealth. George Mason of Gunsten Hall, Edmund Randolph, Richard Bland, Patrick Henry, James Madison and Grayson, Henry Lee of the legion, Benjamin Harrison the elder, the accomplished Innes, Monroe, and Marshall constitute some of the names which appear on the records of that body.

George Washington, Patrick Henry, Edmund Randolph, John Blair, James Madison, George Mason, and George Wythe were the accredited representatives of the State of Virginia to the Federal Convention. Patrick Henry declined to serve — McClurg became his successor. With the exception of the names of Washington, Blair, and Madison, the Constitution contained the signatures of no other delegates from Virginia. Mason and Henry were its active and implacable foes, and by pen and voice from the time of its adoption to the assembling of the Virginia Convention, they made known their objections to the people of the State with a power unexcelled in that day. The selection of the venerable Pendleton as President of the Convention was in no way a test of the

strength of the parties, and until the final roll was called it was in doubt what would be the fate of the Constitution in Virginia. Judge Marshall, in writing of the results, said, "that so small in many instances was the majority in its favor as to afford strong ground for the opinion that had the *influence of character* been removed the intrinsic merits of the instrument would not have secured its adoption." As an illustration of the influence of character, it may be said that no four men exerted more influence in favor of the Constitution than George Washington, Edmund Pendleton, George Wythe, and James Madison, and four purer names were probably never recorded in profane history.

Marshall, the future expounder of this instrument, was not a member of the Convention which framed it, and was thirty-three years of age when he took his seat as a member of the Virginia Convention called to ratify it. The impassioned eloquence of Patrick Henry, and the keen and incisive logic of Mason, day by day hurled with what seemed to be irresistible effect against the instrument, bore heavily upon its friends and caused them to feel the keenest doubt of the ultimate result. Madison and Wythe had met with signal ability the shafts of the opposition. The public press, the great commanding influence of Washington, and the solid phalanx of the soldiery were brought to bear by every ingenuity which skill and tact could devise in favor of its adoption.

Monroe, a young man of thirty, had just addressed the Convention in opposition to the Constitution, which in subsequent years he was called upon to defend and execute. "He was succeeded on the floor by a tall, young man, slovenly dressed, with piercing black eyes that would lead the observer to believe that their pos-

essor was more destined to toy with the Muses than to worship at the sterner shrine of Themis. He was destined, like Monroe, to fill the mission to France, and to preside in the Department of War and in the Department of State under the Federal Constitution. Marshall was in his thirty-third year, and from the close of the war to the meeting of the Convention, with the exception of an occasional session of the House of Delegates, was engaged in the practice of law. His manners, like those of Monroe, were in strong contrast with those of Madison and Grayson. His habits were convivial almost to excess; and he regarded as matters beneath his notice those appliances of dress and demeanor which are commonly considered important to advancement in a public profession. Nor should those personal qualities which cement friendship and gain the affections of men, and which he possessed in an eminent degree, be passed over in a likeness of this young man,—qualities as prominently marked in the decline of his honored life when his robe had for a third of a century been fringed with ermine, as when, in the heyday of his youth, dressed in the light roundabout, he won his way to every heart."

His speech on this occasion received marked attention, and bears the characteristic marks of the speeches of his riper years. His exordium attracts the attention at once by presenting the prominent ideas in his mind without preliminaries. "I perceive," said he, "that the object of the discussion now before us is whether democracy or despotism be most eligible. I am sure that those who framed the instrument now submitted to our investigation, and those who now support it, intend the establishment and security of the former. The supporters of the Constitution claim the title of being firm friends of

liberty and the rights of mankind. They say that they consider it as the best means of protecting liberty. We, sir, idolize democracy. Permit me to attend to what the honorable gentleman [Henry] has said. He has expatiated on the necessity of due attention to certain maxims and certain principles from which a free people ought never to depart. I concur with him in the propriety of the observance of such maxims. They are necessary in any government, but more essential to a democracy than to any other. What are the favorite maxims of democracy? A strict observance of justice and public faith and a steady adherence to virtue. These, sir, are the principles of a good government. No mischief, no misfortune, ought to deter us from a strict observance of justice and public faith. Would to heaven that these principles had been observed under the present government. Had this been the case, the friends of liberty would not be so willing now to part with it."

The speech from which this extract has been taken, in fairness it must be said, exhibited chiefly the skill of the lawyer, rather than the breadth of the statesman. He did not, by a masterful array of the advantages of the Federal Constitution and its beneficent effects upon the people of the country, seek to induce its acceptance by the Convention on its merits, but rather accepting the action of the Federal Convention as a *prima facie* conclusion of the beneficence of the instrument, he sought by skillfulness and tact to avert the ponderous blows of Henry and Mason, hurled at it from time to time from their well-equipped armories.

At a subsequent day, in defending the militia clause of the Constitution, Judge Marshall said: "Are gentlemen

serious when they assert that if the State governments had power to interfere with the militia, it is by implication? If they were, he asked the committee whether the least attention would not show that they were mistaken. The State governments do not derive their powers from the General Government, but each government derives its powers from the people, and each was to act according to the powers given it. Would any gentleman deny this? He demanded if powers not given were retained by implication. Could any one say so? Could any man say that this power was not retained by the States, as they had not given it away? For does not a power remain until it is given away?" And in closing he said, "that the power of governing the militia was not vested in States by implication, because being possessed of it antecedent to the adoption of the government, and not being divested of it by any grant or restriction in the Constitution, they must necessarily be as fully possessed of it as ever they had been; and it could not be said that the States derived any powers from that system, but retained them, though not acknowledged in any part of it."

By far the most interesting speech made by Judge Marshall in the Convention was one in which he elaborated his views on the judicial system provided for in the Constitution. As we read this speech, made thirteen years before he assumed the position of Chief Justice, we see many traces of views which became his judicial judgments. I cannot stop to quote largely from it, but it is an able defense of the right of the Federal Government to establish and maintain its own judicial system. Mason had made the objection that the Federal courts would be used to oppress the people; that their judgments would not be impartial; and that Federal offenders

would escape the penalties of the law because of the partialities of the courts for them. "Let us examine each of them [grants of Federal jurisdiction] with a supposition that the same impartiality will be observed there as in other courts, and then see if any mischief will result from them. With respect to its cognizance in all cases arising under the Constitution and the laws of the United States, he [Mason] says that, the laws of the United States being paramount to the laws of the particular States, there is no case but that this will extend to. Has the government of the United States power to make laws on all subjects? Does he understand it so? Can they make laws affecting the modes of transferring property, or contracts, or claims between citizens of the same State? Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction,—they would declare it void!"

Further on, I quote: "With respect to disputes between a State and the citizens of another State—its jurisdiction has been decried with unusual vehemence. I hope no gentleman will think a State will be called at the bar of a Federal court. Is there no such case at present? Are there not many cases in which the Legislature of Virginia is a party, and yet the State is not sued? It is not rational to suppose that the sovereign power shall be dragged before a court. The intent is to enable States to recover claims of individuals residing in other States. I contend this construction is warranted by the words." It may be doubted whether the Supreme

Court at the time of the decision of *Chisholm v. Georgia* had these views of the great Chief Justice before them, though Mr. Hamilton's views in the eighty-first number of the *Federalist* were in accord with them.

While it cannot be said in justice that Judge Marshall was the leader of the Constitutional forces in this Convention, it can with truth be affirmed that on the subjects which he discussed he displayed the same abilities for which he was afterward so justly distinguished, and won the respect and admiration of all of his colleagues. When by the narrow margin of ten votes in a total of 180, the Constitution was ratified and a committee was appointed by the President to report a form of ratification, we find his name on that committee with Governor Randolph, Mr. Nicholas, Mr. Madison, and Mr. Corbin as his associates; and when, in order to meet the views of the large minority of the Convention and quiet their fears, a committee was appointed to prepare and report such amendments as should be deemed necessary, we find Judge Marshall's name on that committee, associated with George Wythe, Benjamin Harrison, Patrick Henry, Edmund Randolph, George Mason, James Madison, John Tyler, James Monroe, Richard Bland, John Blair, and others. And so on the 27th of June, 1788, the Constitution was ratified by the Convention.

As we look back upon the great record which he was permitted to make for a third of a century in expounding the instrument which he exhorted the people of Virginia to adopt, it may well be doubted whether that instrument would ever have been ratified by the people of Virginia in so close a contest had John Marshall been its foe instead of its friend; and as we view the history and development of our country in its mutation of parties,

and the advancement of this remarkable people in every department of human endeavor, it may well be doubted if he ever did a greater service to the country than in throwing the weight of his great influence in favor of the adoption of the Constitution.

The scene shifts. Forty-one years have passed. The young man in the glow of youthful strength with all of the enthusiasm and zeal of youth is transformed. Age has mellowed his zeal but has not impaired his intellect. His judgments, which for twenty-eight years have been the admiration of the legal world, have added dignity, power, and reverence to the man. At home and abroad the indorsement by Marshall of any legal proposition is eagerly sought and triumphantly adopted. Wisdom and experience are added to his matchless powers; and though his physical form lacks the athletic power which it possessed on the 2d of June, 1788, those lustrous eyes have lost none of their power,—the windows of a fully-developed soul. Perhaps the world fails to record a more striking instance of unselfish patriotism than that of Judge Marshall leaving the bench of the Supreme Court with its important and pressing work, its questions of far-reaching import, involving the interests of the whole country, and offering himself as a candidate for a State Convention in a district which seemed hopelessly opposed to him. His election was the triumph of the man, the citizen. Richmond was to be the scene of another Convention, called to change the Constitution of the State of Virginia; and Judge Marshall regarded the making of a State Constitution the highest duty that a citizen could be called upon to discharge. Pause with me for a moment as that venerable body of men passes in review before us: James Madison, now “fallen into the sear and



yellow leaf," rich in stores of wisdom and experience, a member of the Convention which framed the Federal Constitution,—its reputed father; Marshall's colleague in the Virginia Convention of 1788; Cabinet officer; twice President; and now leaving the quiet repose of Montpelier to aid in the work of constructing a suitable Constitution for his people. James Monroe, twice President, was there,—another of Marshall's colleagues in the Convention of 1788. John Tyler, the son of the senior Tyler, a member of the Convention of 1788, the future President of the United States, was there. John Randolph of Roanoke, quaint, peculiar, satirical, eloquent, in public life for a third of a century, was there. Benjamin Watkins Leigh, Robert Stanard, and Chapman Johnson, the great legal triumvirate, who swayed the Appellate Court of Virginia by their power and eloquence for a quarter of a century, were there. Nicholas, Drumgoole, William B. Giles, John Y. Mason, Philip P. Barbour, Charles Mercer, Alfred H. Powell, Philip Doddridge, John S. Barbour, Littleton W. Tazewell, Lucas P. Thompson, Abel P. Upshur, and many others were names of which any Commonwealth might be justly proud, and than whom none more worthily deserved the wreath of immortality. When Madison, upon the assembling of the Convention, arose and nominated James Monroe for President, there was a hush throughout the whole assembly. He was elected without opposition and conducted to the chair by Madison and Marshall.

Two great questions were presented for the consideration of this body, in the discussion of which Judge Marshall took a prominent part.

The first was the question of the basis of representation in the Legislature,—one party advocating what was

known as the white basis, and the other insisting that the slaves should be represented as laid down in article I, section 3, of the Constitution of the United States. The Blue Ridge Mountains constituted the dividing line between the two sections of the State. The country east of the Blue Ridge contained a large slave population; that west contained but few slaves. The views of the delegates naturally, in a large degree, were controlled by their location. Philip Doddridge was the leader of the west on this great question, Marshall was among the leaders of the east, and voted for the resolution of Mr. Leigh, providing that "representation in the House of Delegates be apportioned among the several counties, cities and towns of the Commonwealth according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years and excluding Indians not taxed, three-fifths of all other persons" (page 322, Debates of Virginia Convention).

In discussing this question, Judge Marshall summarizes it as follows: "Several different plans are contemplated. The basis of white population alone; the basis of free population alone; a basis of population alone; a basis compounded of taxation and white population — or, which is the same thing, a basis of federal numbers. Two other bases were also proposed. One referring to the total population of the State, the other to taxation alone.

"Now of these various propositions, the basis of white population and the basis of taxation alone are the two extremes. Between the free population and the white population there is almost no difference. Between the basis of total population and the basis of taxation there is but little difference. The people of the east thought

they offered a fair compromise when they proposed the compound basis of population and taxation, or the basis of federal numbers. We thought that we had Republican precedent for this — a precedent given us by the wisest and truest patriots that ever were assembled; but that is now passed, — we are now willing to meet on a new middle ground, beyond what we thought was a middle ground, and the extreme on the other side.”

The Convention, after a long and heated debate, practically adopted Judge Marshall’s basis of representation.

The other question, which was only second in importance to the first, was the attempt to do away with the old county court system composed of magistrates appointed by the Governor with the power of self-perpetuation in the court. They were generally men of the highest intelligence, probity, and character; not learned in the law perhaps, in the modern sense, but saturated with the principles of natural justice and equity. It was regarded by many as the most conservative influence in the organization of the State government; and the attempt to overturn it was met by the best ability of the Convention.

Judge Marshall and John Randolph of Roanoke led the fight to sustain it, — and they were successful.

At a later day, speaking of the tenure of office of the judges, and the necessity for their independence, Judge Marshall used this language (page 616 of the Debates): “Advert, sir, to the duties of a judge, — he has to pass between the government and the man whom that government is prosecuting; between the most powerful individual in the community and the poorest and most unpopular. It is of the last importance that in the exercise of these duties he should observe the utmost fairness. Need I

press the necessity of this? Does not every man feel that his own personal security and the security of his property depends on that fairness? The judicial department comes home in its effects to every man's fireside — it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent with nothing to influence or control him but God and his conscience?"

Later on, in advocacy of the principle of the tenure of judicial position to be for good behavior (page 619 of the Debates), he used this memorable language: "Will the gentleman recollect that, in order to secure the administration of justice, judges of capacity and of legal knowledge are indispensable. And how is he to get them? How are such men to be drawn off from a lucrative practice? Will any gentleman of the profession, whose practice will secure him a comfortable independence, leave that practice and come to take an office which may be taken from him the next day? You may invite them, but they will not come. You may elect them, but they will not accept the appointment. You don't give salaries that will draw respectable men, unless by the certainty of permanence connected with them; but if they may be removed at pleasure, will any lawyer of distinction come upon your bench? No, sir. *I have always thought, from my earliest youth till now, that the greatest scourge an angry heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt, or a dependent judiciary.* Will you draw down this curse upon Virginia? Our ancestors thought so, and we thought so till very lately, and I trust the vote of this day will show that we think so still." The Constitution adopted con-

tains a provision for judicial tenure during good behavior.

It would be exceeding the bounds of truth to affirm that Judge Marshall was an orator in the sense in which that word is ordinarily used; but if the power to control and convince men by the presentation of one's views may be regarded as oratory, he may justly be placed in that category. A reputable writer has well described his powers as an orator in this Convention: "There are hundreds yet living who can recall with delight the modest and the deep, thoughtful lines of his benignant face,—those piercing black eyes which never let the image of a friend any more than the semblance of an argument escape his vision, and his lofty figure clothed in the plainest dress of an ordinary citizen, and mingling constantly and kindly with his fellow-men in the street, in the market, on the quoit-ground, or reverently bent in the humblest posture at the Throne of Grace. But, intimate as was his knowledge of the human heart, gathered from a long experience in the camp and at the bar,—those fruitful schools of human nature,—it was not by appeals to the interests and to the passions of men that he sought to lay the stress of his public efforts. Indeed, so utterly did he disregard all such appeals, that he launched in the opposite extreme, and, as if conscious of the true sources of his power, he avoided everything that might influence the mind through the eye. Indeed, like his friend Monroe, he had no manner at all as a public speaker, if by manner we mean something deliberate and studied in action; and he might be as readily expected to speak in a court-room with his hands on a chair, or with one of his legs over its back, or within two feet of a presiding officer in a public body, as in any other way.

. . . "In the common parts of his discourse he spoke with a serious earnestness and with an occasional swing of his right arm, but when he became animated, as we once beheld him, by the delivery of his theme, which was the true import of certain words of the Federal Constitution relating to the judiciary, and by the presence of several of the most astute men of that age who were opposed to him in debate, and who were watching him to his destruction, he rose to the highest pitch of pathetic declamation, thoroughly blended with argument,—the most powerful of all declamation; and he might have been seen leaning forward with both arms outstretched towards the chair, as if in the act of calling down vengeance on his opponents, or of deprecating some enormous evil which was about to befall his country; while the tones of his voice, exalted above his usual habit, were in plaintive unison with his action. . . . The triumph of Marshall's eloquence was heightened by the almost unequalled talents which were arrayed against him — by the subtle and terrible strength of Tazewell; by the severe and sustained logic of Barbour; by the versatile and brilliant but vigorous sallies of Randolph, whose fame as the chairman of the judiciary committee of 1802, which reported to the House of Representatives the bill of repeal of the law passed by the Federalists altering the judiciary system, was at stake; and by the extraordinary skill and blasting sarcasm of Giles, heightened and stimulated by the recollections of ancient feuds which still burned brightly in the breast of his antagonist and in his own (and from a sense of personal reputation which was involved in the passage of the act of repeal in the House of Representatives, which he mainly carried through that body). Of all the scenes which oc-

curred in the Convention of 1829-30, varied, animated, and intellectual as they were, whether we respect the exciting nature of the topic in debate, the zeal, the abilities, the public service, the venerable age and the historical reputation of those who engaged in the discussion,—all enhanced in interest by the unequal division of the combatants in the field,—this was, perhaps, the most striking which occurred in that body.”

The whole world lays its tribute of admiration at the feet of John Marshall for his great judgments. Virginia in this act joins most reverently. But without disparagement of his great services to the country and to the world in his lofty position as Chief Justice, she lays her sincerest tribute of affection upon his grave this day as her peerless citizen. His life, Mr. Chairman, was a truly noble one. It was on the highest plane. His character had no spot or blemish upon it that sweet charity would now consign to oblivion, but it was robust, well-rounded, and symmetrical,—open as day. He was dutiful as a son; affectionate as a parent; tender as a husband; courageous as a soldier; honest and able as a lawyer; wise as a legislator; profound as a judge; he measured up to the highest standard of American citizenship, and furnishes a noble example to the youth of our country for all coming generations. He possessed a mind that created something, a heart that adored something, a faith that believed something, a hope that expected something, a life that was lived for something, and a patriotism that was ready to die for something.

May we not, on this day appointed for honoring his memory, unite with our brethren throughout the Union in grateful thankfulness to God that he gave to the

country such a patriot, to the State such a citizen, to the administration of the law such a magistrate, to Christianity such a defender, and to those who loved him such a friend?

**Remarks of President Gray, Introducing Hon. Richard Olney.**

In this inclement weather we have been dwelling to-day in imagination in a more southern clime, but it is well before we part that our own little corner of the land should not be forgotten. I am going to call upon a New Englander of New Englanders, one who in office knew how to bring the whole power of the United States to sustain the majesty of her law and the judgments of her courts (loud applause), one who is, perhaps, no worse a representative of New England, because he does not always go with the majority (laughter and applause) but one whom, whether we agree with him or not, we are always glad to hear and of whom we are all proud. I call upon the Hon. Richard Olney. (Loud applause, the audience rising.)

**Address of Richard Olney.**

I have felt much hesitation about taking even a small part in these exercises. The theme is too large for treatment in short space; it must suffer at the hands of whoever undertakes it without a command of time and leisure which but few favored mortals possess; it has been spoken to and written of by orators, historians, and statesmen for nearly seventy years; and it is to-day freshly and elaborately dealt with throughout the Union by many of its most eminent citizens. Indeed, for present purposes,



what could be more intimidating than what has been just going on in this very community; than to know that the interesting utterances to which we have just listened only supplement a morning of official and judicial eloquence at the Court House and an afternoon of learned dissertation at Sanders Theatre? In depressing circumstances like these, I can only hope for indulgence if you find me reiterating a thrice-told tale and can promise nothing except to make your ordeal tolerably brief.

I wish to remark upon but three things connected with the career of John Marshall. It is not obvious what most of us are born for, nor why almost any one might as well not have been born at all. Occasionally, however, it is plain that a man is sent into the world with a particular work to perform. If the man is commonly, though not always, unconscious of his mission, his contemporaries are as a rule equally blind, and it remains for after generations to discover that a man has lived and died for whom was set an appointed task, who has attempted and achieved it, and who has made the whole course of history different from what it would have been without him. John Marshall had a mission of that sort to whose success intellect and learning of the highest order as well as special legal ability and training might well have proved inadequate. Yet — the mission being assumed — the first thing I wish to note, and the wonderful thing, is that to all human appearances Marshall was meant to be denied anything like a reasonable opportunity to prepare for it. For education generally, for instance, he was indebted principally to his father, a small planter, who could have snatched but little leisure from the daily demands of an exacting calling and presumably could not have spent all that little on the eldest of his fifteen children. The pa-

rental tuition was supplemented only by the son's attendance for a short period at a country academy and by the efforts of a couple of Scotch clergymen, each of whom successively tutored him for about a year and in that time did something to initiate him into the mysteries of Latin. Such, briefly put, was the entire Marshall curriculum in the way of general education. It was all over before he was eighteen, when the shadow of the revolutionary struggle began to project itself over the land and Marshall joined the Virginia militia and became immersed in military affairs. As lieutenant of militia and lieutenant and captain in the Continental army, he was in active service during almost the entire war, fought at Brandywine, Germantown, and Monmouth, was half-starved and half-frozen at Valley Forge, and during that terrible winter ate his share of the Dutch apple pies ever since historically famous for their capacity to be thrown across a room without damage to either inside or outside. Marshall's opportunities as a student of law were on a par with his educational opportunities generally. Though he is said to have begun his legal studies when he was eighteen, they were at once and continuously interrupted by the military pursuits which occupied him until near the close of the war. The only exception to be noted is that, in an interval between the expiration of one military commission and the issuance of another, he attended a course of law lectures by Chancellor Wythe of William and Mary College. Meagre as the knowledge and training thus acquired would seem to be, they sufficed to procure him his license, and in 1780 or '81 he began to practice. In view of what he subsequently became and achieved, it would be a natural supposition that during the next twenty years he must have been exclusively de-

voted to his profession and by the incessant and uninterrupted study and application of legal principles must have made up for the deprivations of earlier years. Nothing could be farther from the truth. During those twenty years he was almost constantly in public employment, and in public employment of an exciting and engrossing nature. In this period arose and were settled the novel and difficult questions following in the wake of the War of Independence, questions of vital moment to each State as well as to the country at large. Marshall was in the thick of every discussion and every struggle. He was a member of the Virginia Assembly; an executive councillor; general of militia; delegate to the State Convention which adopted the Federal Constitution; member of Congress; envoy to France; and when he was appointed Chief Justice at the end of January, 1801, he was Secretary of State in John Adams's Cabinet and continued to act as such until after Jefferson's inauguration. During this entire period I doubt if there were any three consecutive years during which Marshall was giving his entire time and attention to the practice of his profession.

Contrast the poverty of this preparation with the greatness of the work before him. He probably did not appreciate it himself — it is certain, I think, that his fellow-citizens and contemporaries were far from appreciating it. To most of them the State was closer, dearer, and vastly more important than the Nation — by all of them the significance of the place of the judiciary in the new government was but dimly, if at all, perceived — while to the world at large the judiciary of a new Nation of thirteen small States strung along the North Atlantic seaboard, comprising a population of some four million souls,

necessarily seemed a tribunal of the smallest possible account. To-day the "American Empire," as Marshall himself was the first to call it, with its immense territory and its seventy-five millions of people, is a negligible factor nowhere on earth, and its National Supreme Court ranks as the most exalted and potent judicial tribunal that human skill has yet organized. But the work Marshall was destined to undertake can be estimated only by considering its inherent character. All minor features being disregarded, there are two of capital importance. In the first place, here was a ship of state just launched which was to be run rigidly by chart — by sailing directions laid down in advance and not to be departed from whatever the winds or the waves or the surprises or perils of the voyage — in accordance with grants and limitations of power set forth in writing and not to be violated or ignored except at the risk and cost of revolution and civil war. The experiment thus inaugurated was unique in the history of civilized peoples and believed to be of immense consequence both to the American people and to the human race. But there were also wheels within wheels, and the experiment of government according to a written text entailed yet another, namely, that of a judicial branch designed to keep all other branches within their prescribed spheres. To that end it was not enough to make the judicial branch independent of the legislative and executive branches. It was necessary to make it the final judge not only of the powers of those other departments, but of its own powers as well. Thus the national judiciary became the keystone of the arch supporting the new political edifice and was invested with the most absolute and far-reaching authority. Since almost all leg-

islative and executive action can in some way be put in issue in a suit, it is an authority often involving and controlling matters of high State policy external as well as internal. At this very moment is it not believed, indeed proclaimed in high quarters, that the question of Asiatic dependencies for the United States and incidentally of its foreign policy generally, practically hinges upon judgments of the National Supreme Court in cases requiring the exercise of its function as the final interpreter of the Constitution? What judicial tribunal in Christendom is or has ever been, directly or indirectly, the arbiter of issues of that character?

It was a national judiciary of this sort of which John Marshall became the head one hundred years ago. That he dominated his court on all constitutional questions is indubitable. That he exercised his mastery with marvelous sagacity and tact, that he manifested a profound comprehension of the principles of our constitutional government and declared them in terms unrivaled for their combination of simplicity and exactness, that he justified his judgments by reasoning impregnable in point of logic and irresistible in point of persuasiveness,—has not all this been universally conceded for the two generations since his death and will it not be found to have been universally voiced to-day wherever throughout the land this centenary has been observed? “All wrong,” said John Randolph of one of Marshall’s opinions — “all wrong—but no man in the United States can tell why or wherein he is wrong.” If we consider the work to which he was devoted, it must be admitted to have been of as high a nature as any to which human faculties can be addressed. If we consider the manner in which the work was done, it must be admitted that anything better

in the way of execution it is difficult to conceive. And if we consider both the greatness of the work and the excellence of its performance relatively to any opportunities of Marshall to duly equip himself for it, he must be admitted to be one of the exceptional characters of history seemingly foreordained to some grand achievement because fitted and adapted to it practically by natural genius alone.

If it be true — as it is, beyond cavil — that to Washington more than to any other man is due the birth of the American nation, it is equally true beyond cavil that to Marshall more than to any other man is it due that the nation has come safely through the trying ordeals of infantile weakness and youthful effervescence and has triumphantly emerged into well developed and lusty manhood. Had the Constitution at the outset been committed to other hands, it could have been and probably would have been construed in the direction of minimizing its scope and efficiency — of dwarfing and frittering away the powers conferred by it and of making the sovereignty of the nation but a petty thing as compared with the sovereignty of the State. Under Marshall's auspices, however, and his interpretation and exposition of the Constitution, the sentiment of nationality germinated and grew apace, a vigorous national life developed, and an indestructible union of indestructible States became a tangible and inspiring entity, appealing alike to the affections and the reason of men, and in which thus far at least they have seen both the ark of their safety and an ideal for which willingly to lay down their lives. I refer thus to the past because the past is assured and because there are those who look to the future with apprehension — who do not disguise their fear that the Re-

public of Washington and Marshall is now suffering a mortal assault not from without but from within — not from “foreign levy” but from “malice domestic.” Those who take this view include men of both the great political parties and men who deservedly command the highest respect and deference from their fellow-countrymen. Nevertheless, they must not be allowed to lessen our faith in the final triumph of the fundamental ideas which underlie our national life. The fathers did not build upon a quicksand but upon a rock — else the structure they reared could hardly have survived foreign aggression, a disputed succession, and a civil war the greatest and most sanguinary of modern times. But their work was by human hands for human use, and even their wisdom could not guard it against the follies and the sins of all future custodians. That gross blunders have been committed, blunders unaccountable in their origin and as yet unfathomable in their consequences, may be admitted, is indeed sorrowfully admitted by many, if not a majority, of those who have nevertheless since contributed to keep their official authors in power. But blunders, however inexcusable or apparently injurious, must be deemed irretrievable only in the last resort, and Heaven forbid any admission that the American Republic can be wrecked by any one or even two administrations. The truth here, as almost always, lies between extremes — between ultra-conservatives and pessimists on the one hand and ultra-progressives and optimists on the other. The former would put back the hands of the clock a hundred years — would have us live and act as if the conditions of the Washington and Marshall era were still about us — in effect would have us tear up the railroad and sink the steamship and return the lightning to

the heavens whence Franklin brought it down. The latter would have us believe that, to act well our part on the world-wide stage which alone limits the activities of modern civilized states, we must ape the fashionable international follies and vices of the period even to the point of warring upon, subjugating, and exploiting for trade purposes eight millions of alien peoples in the Pacific seas seven thousand miles from our own shores. Between these extremes lies the path of honor, of morality, of safety, and of patriotism, and notwithstanding present aberrations the American people may be absolutely trusted sooner or later to find it and to walk in it. They will certainly not forget that this is the dawn of the twentieth, not of the nineteenth century. They will just as certainly determine that to be in touch with the best thought and temper of the time, to be the most truly progressive of all peoples, to do every duty and fulfill every function required by its high place in the world — they will certainly determine that to do and to be all this — neither means that the American nation must imitate the most questionable practices of other states nor requires any abandonment of American principles or American ideals. To believe or to hold otherwise is to despair of the Republic, and to despair of the Republic is to lose faith in humanity and in the future of the race.

The incalculable debt of the country to the two great Virginians, impossible of repayment, can never be too often or too emphatically recognized by the entire body of the American people. Upon the bar, however, devolves an especial duty, namely, to see to it that the merits of its incomparable chief are not obscured by the showier deeds of warriors and statesmen. The observance of this day, therefore, by the lawyers of the country



generally is eminently appropriate, while we in this corner of the land are exceptionally favored in that Virginia has lent us for our celebration one of the foremost of her lawyers and citizens. In recognition of the honor of his presence and in appreciation of the immense services of his native State to the cause of a stable and coherent nationality, I propose that the company rise and drink to the ever-increasing prosperity of the Commonwealth of Virginia and to the good health and long life of her distinguished representative on this occasion.

## **STATE OF RHODE ISLAND.**

The celebration by the Rhode Island Bar Association, on the fourth day of February, 1901, of the one hundredth anniversary of the installation of John Marshall as Chief Justice of the Supreme Court of the United States, was one of the most notable events in the history of the Association.

Brown University joined in the celebration, which took place at three o'clock in the afternoon, in Sayles Memorial Hall, tendered by the University for the purpose. The Lieutenant-Governor, the Mayor of the City of Providence, Ex-Chief Justice Durfee, and the Judges of the United States and State courts were present. The exercises were opened by prayer by the President of Brown University, William H. P. Faunce, after which the President of the Rhode Island Bar Association, Hon. Francis Colwell, made the opening address, and at the close introduced Hon. Le Baron B. Colt, Judge of the United States Circuit Court, who delivered the oration.

### **Introductory Address by Hon. Francis Colwell.**

At the invitation of the Rhode Island Bar Association, this notable audience has assembled here to-day to unite in commemoration of the one hundredth anniversary of the day when the great guardian genius of our Constitution, John Marshall, commenced his illustrious career of nearly thirty-five years as Chief Justice of the Supreme Court of the United States.

Said our great Judge Story, upon the death of Judge Marshall in 1835: "The Constitution of the United States owes more to John Marshall than to any other single mind, for its true interpretation and vindication." To-day, after the lapse of more than sixty years, that opinion is concurred in all over the civilized world. For an instant, consider what contest in the history of any people can be compared with that waged over the adoption of our Constitution in the days of the original thirteen States; what one fraught with such portentous results?

Adopt a Constitution, and a nation was born to us. Reject the Constitution, we were "dissevered, discordant and belligerent States," an easy prey for every foreign foe, and open to foreign conquest and subjugation. It is scarcely possible for us now to measure or comprehend the stupendous import of that struggle. But while we shall ever glory in the lives of those who were inspired to fight and win for us in that great contest for a Constitution, let us not forget those who not only fought for its adoption, but defended and vindicated it to all the world.

The great and unique glory of him whom we meet to honor to-day was that he not only battled for the adoption of our Constitution against formidable opposition, but after its adoption, as with a mind inspired, out of his own brain, with no precedent to guide, so interpreted and supported that instrument with sound invincible opinions as to establish it beyond all molestation. And let us bear in mind that the establishment of that Constitution begot in our people a national spirit and pride of nationality, which has survived all shocks, internal and external, and to-day so pervades our whole land as to make us one of the impregnable powers of the earth.

Let us here and now give thanks that John Marshall of Virginia is the John Marshall of a united people, joining to-day under the Constitution he loved and lived for, in grateful plaudits to his memory.

The Rhode Island Bar Association early voted to commemorate the day in pursuance of the spirit of the American Bar resolution. I desire in behalf of the Rhode Island Bar Association to express the sincere obligation we feel under to our grand *alma mater* for its proposition to unite with us in the observance of the day; to her we are indebted for the use of this spacious and beautiful Memorial Hall, affording opportunity to all to participate in this celebration.

In furtherance of its purpose to celebrate this day in as appropriate a manner as possible, the Rhode Island Bar Association extended an invitation to one of the Judges of the United States Court, whose name has long been familiar to us, to speak to us of John Marshall on this occasion. That invitation was kindly accepted, and I now have the honor and pleasure of presenting the Hon. Le Baron Bradford Colt, United States Circuit Judge.

*Oration of Le Baron Bradford Colt.*

On the day of the first meeting of the Supreme Court of the United States at the city of Washington, one hundred years ago to-day, John Marshall took his seat as Chief Justice. This day has been appropriately called "John Marshall Day," and it is a fitting time for the Bar Associations, the Courts, and the representatives of our seats of learning, assembled together, to recall the commanding and unique position the great Chief Justice occupies in our constitutional history, and to remind the

people of the inestimable blessings which have flowed from his judicial labors. It is also fitting for the President of the great Federal Commonwealth which bears the indelible impress of his genius, to request the Congress to observe with appropriate exercises the centennial anniversary of the day he became the head of the Supreme Court and began his immortal work of upbuilding the Constitution.

X It was recently said with much truth: "John Marshall yet remains the great unlaureled hero of early American history." His work is not generally known nor fully appreciated. Such is the common fate of the highest judicial achievements. From their nature they do not attract popular attention; and yet a simple entry on the docket of the Supreme Court of the United States may affect the destiny of the nation more than Webster's reply to Hayne, or Dewey's victory in Manila Bay. We live under a government of law. Our supreme law is embodied in a written constitution, and the judgments of the highest court on constitutional questions may involve the very existence of the Federal Union.

The life of Marshall has been called the constitutional history of the country from 1801 to 1835. He set and fixed in its proper place the keystone of the beautiful and symmetrical arch of States which now spans a continent. He carried the Constitution through its experimental and formative stages, defined its enumerated powers, and clothed them with an authority and living force commensurate with their purpose. He "gradually unveiled" the Constitution, in the words of Bryce, "till it stood revealed in the harmonious perfection of the form which its framers had designed."

— We are to-day what the Constitution as expounded by

John Marshall has made us. The character and supremacy of the National Government we owe largely to him. Marshall was more than the interpreter of the Constitution. He was the creator of constitutional law as applied to a written constitution. His luminous judgments determined whether the Constitution should stand or fall. They proved the Constitution created, in the words of Chief Justice Chase, "an indestructible Union, composed of indestructible States." They demonstrated that a Federal Union strong enough to perpetuate itself, and supreme within its delegated powers, was not a menace to the independence of the States nor to individual liberty, but was the guardian and shield of both. They defined the relative rights of the States and the Federal Government under the Constitution, involving often the momentous question of sovereignty—the fatal rock on which Federal Unions are broken into fragments. They settled beyond challenge or debate the question of sovereignty as a judicial question arising under the Constitution. The only right to dissolve the Union which remained with the States after these adjudications was the right of revolution. They established the novel and striking feature of our political system that the construction and interpretation of the supreme law rests with the judiciary department. They vindicated the supremacy of the Constitution over all citizens and all States. They proved beyond question that the Constitution created a government, a composite republic, a nation; not a league, a compact, or a mere confederacy. They undoubtedly preserved the Union in 1861, when the attempt was made to settle constitutional questions by force of arms. Had not the judgments of the Supreme Court, during the thirty-four years Marshall was Chief Justice, established

the supremacy of the Constitution as opposed to the doctrine of State sovereignty, the Civil War would have been a war of conquest, and the Federal tie forever severed. "The Southern Confederacy, as the embodiment of political ideas," says Judge Phillips, "surrendered not to Grant, not to Sherman, not to Thomas or to Sheridan, but to the statesman, the jurist and sage,— John Marshall."

The decisions of Marshall have instilled in us the worship of the Constitution. They have built up a national spirit. They have not led to the consolidation of the States, but to the consolidation of national sentiment. They are the foundation of the patriotism, affection, and pride which fill all our hearts as we look upon our country at the opening of a new century, and contemplate with emotion the proud position she occupies among the nations of the earth. They have elevated our form of government in the eyes of the world, and disproved the judgment of mankind that a Federal Commonwealth is weak and unstable. They have shown that, in the hands of an intelligent people, such a political system may exist in a perfect form for centuries, that it may extend over a vast area, peopled by different races, and may realize under such conditions its high ideal of combining the energy, patriotism, and freedom of a small republic with the unity, security, and power of a great empire. Speaking of Marshall's decisions in an address before the American Bar Association, Edward J. Phelps declared: "They passed by universal consent, and without any further criticism, into the fundamental law of the land, axioms of the law, no more to be disputed. They have remained unchanged, unquestioned, unchallenged. They will stand as long as the Constitution stands. And if that should

perish, they will remain, to display to the world the principles upon which it rose, and by the disregard of which it fell."

Our National Government was moulded and shaped by the master hand of John Marshall. To comprehend the character and greatness of his work, it is important to understand the nature and tendency of the form of government which was organized under the Constitution. Of all political systems a Federal Commonwealth is the most complex, delicate, and elaborate. It can only exist among a highly civilized people, who have been educated for generations in the art of civil government. It is an ideal government. It is founded upon a compromise between opposite political systems, and it seeks to combine the advantages of each: the freedom of a small State with the unity and security of a consolidated empire. It is an artificial system; and, inherently, it is perhaps the weakest known form of government. Based on a division of sovereignty, it is a sovereign within sovereigns, a government within governments, a single State in some things and many States in other things, a unit in its external relations and on matters which affect the general welfare, and composed of many units in its internal government. States and cities have repeatedly striven to realize the Federal idea, but, with three or four exceptions, they have been successful only in an imperfect degree, and for a comparatively short period of time. The most illustrious exception is the United States. History teaches what we should expect from the nature and artificial character of its organization,—that the ever impending danger to this political system is not consolidation, but the weakness of the Federal bond. The forces which tend to direct the States towards the central union are less strong than the



forces which tend to drive them away from it, because the ties of citizenship, local interests, and a common history bind the people to the State and its autonomy.

Federal unions have always perished from the weakness of the Federal tie, or from conquest. They have never grown into a consolidated state through the destruction of the separate members of the Union. It was the weakness of the Federal tie which constantly threatened the disruption of the Achaian League. And the same is true of the United Netherlands. The Swiss Confederation has never suffered from the strength of the central power, but rather from its inborn weakness. The history of our own Federal Union is familiar. We know that for three-quarters of a century after the adoption of the Constitution the grave peril, ever present, sometimes threatening, and once only averted by civil war, was disunion, not consolidation. Historians have always recognized the inherent weakness of a Federal form of government. It was not surprising, therefore, that in 1863 the eminent English historian and scholar, Freeman, after ten years of research and reflection on the subject, should have begun the publication of a work entitled, "History of Federal Government from the Foundation of the Achaian League to the Disruption of the United States," in which he prophesied the exchange of ambassadors between the United States and the Confederate States before the year 1869. That Freeman never completed his work, that his prophecy proved false, was owing, in a large measure, to the constitutional decisions of Chief Justice Marshall.

Marshall's early conviction of the supreme danger which confronted the Federal Union is stated by Judge Story: "In his view the Republic is not destined to per-

ish, if it shall perish, by the overwhelming power of the National Government, but by the resisting and counter-acting power of the State sovereignties." Marshall met and overcame the danger, except when revolution is attempted, by incorporating into the fundamental law the great fact that our Federal Constitution establishes a perpetual government complete within itself.

Marshall's work was instrumental in building up a national spirit. Constitutions grow. They do not march alone. National spirit is the product of growth. It is not a sudden creation. A national constitution, to be effective and fulfill the purpose for which it is designed, must reflect the spirit and temper of the people. The life of such a constitution is dependent on the growth of a strong national sentiment. Our Federal Constitution was a creation. It did not represent a growth. It was an experiment, a hope, a dream. The people were full of apprehension and dire forebodings as to the result. They saw the spectre of a "kingly crown," the destruction of the States, the subversion of their liberties. They had not grown up to the National idea. Their spirit and temper, their laws and governments, were colonial. Their interests and affections, their habits, prejudices, and past history, bound them to the States. The Colony or State was their mother, the centre of their political life, and to her they owed allegiance first of all. They were citizens of Rhode Island, Massachusetts, Virginia,—not American citizens.

Twelve years before Marshall took his seat, the Constitution, in the words of John Quincy Adams, had been "extorted from the grinding necessity of a reluctant people." The popular vote was undoubtedly against its adoption. The spirit of the times is well illustrated by

Patrick Henry, who exclaimed in the Virginia Convention of 1788, when speaking of the framers of the Constitution: "Who authorized them to speak the language of '*We, the people,*' instead of '*We, the States?*' States are the characteristics and the soul of a confederation. If the States be not the agents of this compact, it must be one great, consolidated, national government, of the people of all the States." It is seen in the adoption of the Constitution by the narrow majority of three in the New York Convention, ten in the Virginia Convention, and nineteen in the Massachusetts Convention, after the most strenuous labors of its advocates, and under the pressure brought about by the annihilation of public credit, the threatened paralysis of commerce, and the impending dissolution of the Confederation. It is shown in bitterly denouncing as unconstitutional abuses of power Washington's proclamation of neutrality in 1793 on the outbreak of the war between England and the French Republic, and the ratification of Jay's treaty with England in 1795. It is exhibited in the statute of the State of Georgia inflicting the penalty of death on any one who should presume to enforce the process of the Supreme Court in the case of *Chisholm v. State of Georgia*, where the State was held liable for the payment of a private claim; and in the case of the *United States v. Peters*, where the Governor of Pennsylvania ordered out a brigade of militia to obstruct the service of a Federal writ.

"Not a year went by," says McMaster, "but one or more States bade defiance to the Federal government." The Virginia and Kentucky resolutions of 1798 and 1799 also bear witness to the want of national sentiment; so, in like manner, the proposed amendment to the Consti-

tution submitted by John Randolph: "The Judges of the Supreme Court and all other courts of the United States shall be removed by the President on the joint address of both Houses of Congress." The same state of public feeling is indicated in the popular revulsion against the Federalists which soon swept that party out of power, and later out of existence, and installed the opposition, then known as the Republican party, thirty days after Marshall became Chief Justice.

For thirty-four years Marshall's decisions vindicated the necessity and value of the Constitution. They incorporated the national idea into the fundamental law, and they have been a most potent factor in the development and promotion of the intense national spirit which now pervades the country.

Marshall's soul was filled with the spirit of the Constitution,—the soul of the patriot and statesman as well as jurist. He loved the Constitution. It was his life. His judgment and affections bound him to it. His great intellectual powers were devoted to it. He studied and mastered it. It was his constant practice to read and re-read it. He knew its scope and purpose, its strength and weakness, its powers and limitations, its checks and balances. He was with it at its creation. He had stood by its cradle. He had followed its history. He realized the struggles and sufferings which preceded its birth, and the ruin which was involved in its fall. As he wrote those masterpieces of judicial reasoning there seems ever present to his mind the beautiful and stately preamble:

"We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty

to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

At the same time, his thoughts must have carried him back to the struggles of the Revolutionary War in which he had participated,— to Brandywine, Germantown, and the blood-tracked snows of Valley Forge; to his efforts in the Virginia Legislature to secure a more efficient Federal Government; to his exertions in the convention of his own State in behalf of the adoption of the Constitution; to his triumphant defense of Washington's administration in the Virginia Legislature; to the insults heaped upon the weakness of his country by Talleyrand during his mission to France; to his supreme effort at a critical time in sustaining the rightful authority of the Executive in the Congress of 1799,— these and other great events in which he took part must have crowded upon his memory, animated his whole being, and deepened his conviction that the Constitution should be interpreted in the spirit of the preamble, and so secure to the people the blessings of liberty and a perpetual Union.

The Constitution was the outcome of mutual concessions and many compromises. It was offered to the people of the several States for ratification as the best result attainable. It was regarded by the advocates of a strong Union as too weak, and by those of a weak Union as too strong. "Nobody liked all its provisions, and everybody feared some of them." It was adopted by its framers in a spirit of harmony and patriotism, and lest their efforts might prove fruitless. The general sentiment of the Convention finds expression in the words of the venerable Franklin: "I agree to this Constitution with all its faults — if they are such — because I think a general government necessary for us. I consent to this Constitution

because I expect no better, and because I am not sure it is not the best. The opinions I have had of its errors I sacrifice to the public good."

The wisdom, ripe experience, lofty patriotism, and constructive powers of that remarkable body of men who framed the Constitution, and the greatness of their work, are universally recognized; but it is equally true that the instrument as it left their hands was not a finished and complete work. The Constitution is not merely the work of the framers, says Mr. Bryce, "but the work of the judges, and most of all of one man, the great Chief Justice Marshall." It was designed as the framework of a comparatively novel form of government, and not as a complete code of laws. It was a skeleton, and the heart and brain and nerves to make it a living organism were in a large degree supplied by Marshall's construction and interpretation. The powers enumerated are brief. They are broad in scope and expressed in general terms. Much was necessarily left to implication, and much was designedly omitted. This resulted from the jealousy of the States and the fear of consolidation or despotism. The framers realized that if all the powers essential to accomplish the great purposes of the instrument had been fully set out it probably never would have been ratified. Had the Constitution contained a provision that the Supreme Court should be the final judge of the fundamental law and of its own jurisdiction, with the power to nullify an Act of Congress or a State statute, its adoption would have been extremely doubtful. It was admitted at the time that its success or failure depended upon its construction. This was the great work which fell to Marshall, and the saying is true: "He made of us a nation by construction."

The fame of Marshall rests largely upon his judicial judgments adjusting the relative powers of the Federal Government and the States, under the Constitution. The settlement of these rights has always been the battleground of Federal unions and a menace to their perpetuity. It was this irrepressible conflict which nearly wrecked the Confederation, which divided the convention that framed the Constitution, and constantly imperiled that instrument after its adoption. The people under a Federal system are always divided into two great political parties: those who favor and those who oppose a strong central authority; those who believe such authority is indispensable to the maintenance of a permanent Union and free institutions, and those who believe it dangerous to the rights of the States and to individual liberty. Marshall refers to this when he wrote: "The country was divided into two great political parties, the one of which contemplated America as a Nation, and labored incessantly to invest the Federal head with powers competent to the preservation of the Union; the other attached itself to the State governments, viewed all the powers of Congress with jealousy, and assented reluctantly to measures which would enable the head to act in any respect independently of the members." It is the verdict of history that the danger to the rights and independence of the States and the freedom of the people from the encroachments of the central authority does not exist under a Federal system entered into by sovereign States; and Marshall showed consummate wisdom and statesmanship in so adjusting by judicial construction the relative powers of the Federal Government and the States as to secure the supremacy of the Constitution and a permanent Union.

The new government had been organized only a short time when the momentous questions of constitutional construction endangered its stability and existence.

Did the Constitution establish a sovereign Nation or a mere compact between sovereign States? Is the Federal Government the final judge of the extent of the powers granted under the Constitution? Is the Supreme Court the sole judge of its own jurisdiction; and is it authorized to declare what the supreme law is? Did the Constitution establish an efficient and permanent government, or is the Constitution, in the words of Marshall, only "a solemn mockery;" "a magnificent structure, indeed, to look at, but totally unfit for use?" Is it, as Pinkney exclaimed in *McCulloch v. Maryland*, "a competent guardian of all that is dear to us as a Nation," or is it "a mere phantom of political power, a pageant of mimic sovereignty?"

The supremacy of the Constitution was attacked in many ways. It was insisted that the Constitution did not destroy, as an ultimate question, the sovereignty of the States. The Supreme Court is not the judge of its own jurisdiction, because that would make it sovereign. It might be a convenient agency in the government, but it is inconsistent with the nature of sovereignty that a sovereign State should submit to its judgments. This would make the agent the master, and the Supreme Court would become a menace to the States. There is no supervisory power in the Supreme Court to revise the action of a sovereign State. It has no right to nullify the legislative act of a State. It has no power to declare void an Act of Congress because, under the Constitution, the government is organized into co-ordinate departments of equal authority. The powers expressly granted to



Congress and the prohibitions imposed on the States, under the Constitution, should receive a strict construction. The power of Congress to make all necessary and proper laws to carry into effect the powers granted by the Constitution should not be expanded by implication to cover other powers not specifically enumerated.

The answers to these and other contentions are found in Marshall's decisions, and they are embraced in certain fundamental conclusions: The Constitution organizes a government complete within itself. It establishes a perpetual Union and is the guardian of the rights of the people. For these great purposes, the powers conferred by that instrument are sufficient. Under the Confederation, the central authority exerted its action upon sovereign States and they were not compelled to obey its mandates. Under the Constitution, the Federal powers are exerted directly upon the people, and they establish a government, as distinguished from a mere confederation, with the usual powers of a government, and organized into different departments. The Constitution does not limit the exercise of Federal power to strictly Federal subjects, but goes beyond; and by its prohibitions upon the States, it shields the personal rights of the individual. Sovereignty in the United States resides in the people. It does not rest, as in England, with Parliament, or with the sovereign ruler as in many European countries. The people have surrendered a portion of their sovereignty in the form of a written constitution, and the people only can revoke, alter, or amend their own supreme law. The national authority is conferred and measured by the Federal Constitution, and "prescription cannot aid it, nor precedent enlarge it." The Constitution is the supreme law of the land, and as such

is supreme over all citizens, and State authority. The reserved powers of the States cannot stay the operation of the supreme law.

The Union being perpetual, it cannot be dissolved by a part of the States, or by the people of those States. The Federal Government is the final judge of the nature and extent of its powers under the Constitution. The Supreme Court is the judge of its own jurisdiction, and of what the law is. It may nullify an Act of Congress or of a State, and it has a supervisory power over the judgments of the highest courts of a State where a constitutional question is involved. There are also implied powers in the Constitution; and if the end be legitimate, the means appropriate to that end, when not prohibited, are constitutional, if within the spirit and scope of that instrument.

Such were some of the principles of construction applied to the Constitution in Marshall's decisions, which, for lucid and cogent reasoning, power of analysis, comprehensiveness and broad generalization, have never been surpassed. They cover the great underlying problems of constitutional interpretation. They deal with the questions of the powers granted to Congress; the reserve powers of the States, and the restrictions imposed upon the States by the express and implied powers of Congress.

*Marbury v. Madison* was one of Marshall's earlier and most famous decisions. It was there held that the Constitution is the supreme law; that an Act of Congress repugnant thereto is void; and that the Supreme Court is the final judge of the fundamental law.

"The question," said the Chief Justice, "whether an act repugnant to the Constitution can become the law of the land is a question deeply interesting to the United

States. . . . That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. . . . This original and supreme will organizes the government, and assigns to different departments their respective powers. . . . The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts on the part of the people to limit power in its own nature illimitable.

“Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the Legislature repugnant to the Constitution is void.

“This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of the fundamental principles of our society. . . . It is emphatically the province and duty of the judicial department to say what the law is. . . . This is of the very essence of judicial duty. . . . Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government,

is entirely void, is yet, in practice, completely obligatory. It would declare that, if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. . . . It is prescribing limits, and declaring that those limits may be passed at pleasure.

“That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction.”

It was by such unanswerable reasoning that Marshall reached his conclusions.

In *United States v. Peters*, where the question arose of the power of a State by statute to disregard a judgment of the Supreme Court, the Chief Justice declared:

“If the Legislatures of the several States may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals.”

The power of the Supreme Court to review the judgment of the highest court of a State, where a constitutional question is involved, was affirmed in *Cohens v. Virginia*. In his great opinion in that case, the Chief Justice observed:

“The questions presented to the court by the first two points made at the bar are of great magnitude, and may be truly said vitally to affect the Union. They exclude the inquiry whether the Constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review; and

maintain that, admitting such violation, it is not in the power of the government to apply a corrective. They maintain that the nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made by a part, against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain that the Constitution of the United States has provided no tribunal for the final construction of itself or of the laws or treaties of the nation; but that this power may be exercised, in the last resort, by the courts of every State in the Union. That the Constitution, laws, and treaties may receive as many constructions as there are States; and that this is not a mischief, or, if a mischief, is irremediable. . . . If such be the Constitution, it is the duty of the court to bow with respectful submission to its provisions. If such be not the Constitution, it is equally the duty of the court to say so; and to perform that task which the American people have assigned to the judicial department." After quoting Article VI of the Constitution, which declares that the Constitution, laws and treaties shall be the supreme law of the land, the opinion proceeds: "This is the authoritative language of the American people; and, if the gentleman please, of the American States. It marks, with lines too strong to be mistaken, the characteristic distinction between the government of the Union, and those of the States. The General Government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the Constitution; and if there be any who deny its necessity, none can deny its authority. . . . A constitution is framed for ages to come, and is designed

to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests; and its framers must be unwise statesmen, indeed, if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter. . . . The people made the Constitution, and the people can unmake it. It is the creature of their will, and lives only by their will. But this supreme and irresistible power to make or to unmake resides only in the whole body of the people; not in any subdivision of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it."

This opinion, which is tinged with patriotic emotion, points out the primary and elemental principles on which the Constitution rests.

*McCulloch v. Maryland* is a notable decision. The case involved the power of the government to establish a bank, as an implied power under Article I, Section 8, giving Congress power to make all necessary and proper laws for carrying into execution the powers vested by the Constitution in Congress or in the Government. The power was affirmed by the Chief Justice. "We admit," he said, "as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Con-

stitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

Another great question decided in that case related to the power of a State to tax a bank established by the government. On this point the Chief Justice declared:

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. . . . If the States may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument."

The necessity of uniform regulations of commerce was the most powerful cause which led to the adoption of the Constitution. The construction of the commerce clause in that instrument came under consideration in *Gibbons v. Ogden*. The State of New York had granted the exclusive right to Robert Fulton and Livingston to navigate all the waters of New York with vessels propelled by steam. This right had been assigned to Ogden, the original plaintiff. The highest court of New York had restrained the original defendant, Gibbons, from navigating the Hudson River with steamboats licensed under an Act of Congress. The State law was held void. "Commerce," said the Chief Justice, "undoubtedly, is traffic, but it is something more: it is intercourse. . . . All America understands, and has uniformly understood, the

word 'commerce' to comprehend navigation. . . . The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. . . . This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . The power of Congress, then, comprehends navigation within the limits of every State in the Union, so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several States, or with the Indian tribes.' . . .

"Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the Government of the Union are to be contracted by construction into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may by a course of well digested but refined and metaphysical reasoning, founded on these premises, explain away the Constitution of our Country, and leave it a magnificent structure, indeed, to look at, but totally unfit for use."

In *The American Insurance Company v. Canter*, where the validity and effect of the treaty of 1819, by which Spain ceded Florida to the United States, was before the court, the Chief Justice said: "The Constitution confers absolutely on the Government of the Union the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty."

Marshall was not in favor of a narrow construction of the Constitution, nor of an enlarged construction beyond



the natural meaning of the words. Upon this general question, he observed, in *Gibbons v. Ogden*:

“What do gentlemen mean by a strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent,—then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded. . . . The enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction.”

This occasion will not permit a more extended reference to Marshall's opinions. It is sufficient to observe that they constitute in a large measure the judicial structure of the nation.

When we speak of the Supreme Court decisions on constitutional questions as those of Marshall, we are doing no injustice to the other members of the court. His master mind directed and governed that tribunal on this subject. This was the verdict of his contemporaries. In dedicating his "Commentaries on the Constitution" to Marshall, Judge Story wrote: "Other judges have attained an elevated reputation by similar labors in a single department of jurisprudence. But in one department (it need scarcely be said that I allude to that of constitutional law) the common consent of your countrymen has admitted you stand without a rival. Posterity will surely confirm by its deliberate award what the present age has approved as an act of undisputed justice."

Of the six decisions involving questions of constitutional law from the organization of the court in 1790 to Marshall's appointment in 1801, only two were of grave importance. From 1801 to 1835, covering the period Marshall was Chief Justice, sixty-two decisions on constitutional questions were given, in thirty-six of which the opinion of the court was written by him. Although this was his most important work, it comprises only a fraction of his judicial labors. In the thirty volumes of reports extending from the first of Cranch to and including the ninth of Peters, there are eleven hundred and six cases in which opinions were filed, and five hundred and nineteen of these were delivered by Marshall. These opinions cover questions on nearly every important branch of jurisprudence. The case of *Ogden v. Saunders* was the only case raising a constitutional question where the majority of the court differed from the Chief Justice.

In the department of constitutional law, the field was new. There were few precedents, because the construc-

tion and declaration of the supreme law by a court, under a written constitution, was unknown. Marshall's only light was the inward light of reason. He had "no guides but the primal principles of truth and justice." He does not cite a single decision on the great constitutional questions determined in *Marbury v. Madison*, *Cohens v. Virginia*, *Sturges v. Crowninshield*, *McCulloch v. Maryland*, and *Dartmouth College v. Woodward*. Judge Story said, "When I examine a question, I go from headland to headland, from case to case; Marshall has a compass, puts out to sea, and goes directly to his result." Tradition records (we will not say truthfully) that when Marshall had finished reading his great opinions, he would sometimes observe, "These seem to me to be the conclusions to which we are conducted by the reason and spirit of the law. Brother Story will furnish the authorities."

Marshall's decisions are demonstrations founded upon pure reason. They are chains of compact reasoning leading to inevitable conclusions. They are almost devoid of illustration or analogy. They show profound meditation and deep penetration. They grapple with great underlying principles, and exclude extraneous circumstances. In the words of a contemporary: "When we regard their originality, their depth, their clearness and their adamant strength, we look upon them as the highest efforts of the human mind." Webster declared: "When Judge Marshall says, 'It is admitted,'—Sir, I am preparing for a bomb to burst over my head and demolish all my points." After hearing Marshall deliver several opinions, William Pinkney exclaimed: "He was born to be the Chief Justice of any country in which he lived." And John Adams said that his gift of John

Marshall to the United States was the proudest act of his life.

When Marshall, at the age of forty-five, was appointed Chief Justice, he had been engaged in the leading events of his time. His previous life was a training and preparation for the high office he then assumed. He was already distinguished as a patriot, lawyer, legislator, statesman, and diplomatist; and, soon after he became Chief Justice, his "Life of Washington" was published.

While serving as Secretary of State he was nominated by President Adams for Chief Justice; his nomination was unanimously confirmed by the Senate; and he was commissioned January 31, 1801. He took his seat on February 4, to enter upon a career the most remarkable in judicial annals.

Marshall possessed intellectual powers of the highest order. The commanding features of his mind were calmness, penetration and profound wisdom. In judicial acquirements he was not the equal of some of his contemporaries. He was not what is termed a learned man, and he had none of the arts of an advocate. He relied upon the original powers of his mind, and not upon knowledge gained from others. He worked out the great problems of constitutional jurisprudence as Newton worked out the great problems of natural science. He mastered new subjects by his powers of analysis and intuitive perception of the truth. "He seized, as it were by intuition," says Judge Story, "the very spirit of juridical doctrines, though cased up in the armor of centuries; and he discussed authorities as if the very minds of the judges themselves stood disembodied before him."

Marshall's moral nature was in harmony with his intellectual. His affections were strong and pure. His

character was spotless. It is said he never had an enemy. The affectionate regard which bound others to him in his youth and during his long public career, became, towards the closing days of his life, an exalted veneration. His nature was marked by deep sensibility and tenderness. Speaking of his domestic virtues, Judge Story, in his beautiful eulogy, declares: "After all, whatever may be his fame in the eyes of the world, that which in a just sense was his highest glory was the purity, affectionateness, liberality, and devotedness of his domestic life. Home, home, was the scene of his real triumphs."

Though distinguished for moderation and good temper, he was immovable in his performance of judicial duty. The trial of Aaron Burr is an illustration of his firmness and impartiality under the most trying circumstances. The country was convinced of Burr's guilt, and Marshall's rulings were severely censured. "Marshall," exclaimed Wirt, "has stepped in between Burr and death." But the great Chief Justice stood unmoved while the storm of passion and prejudice raged about him. The English law of treason, he declared, had not been imported into the Constitution. Treason under the Constitution consists in some overt act, and it is not treason for the subject to "imagine the death of the King." Marshall's deepest feelings were aroused in this memorable trial. Listen to these words: "That this court dares not usurp power is most true. That this court dares not shrink from its duty is not less true. No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he has no choice in the case; if there is no alternative presented

to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace."

When the question was put to Wirt after the trial: "Why did you not tell Judge Marshall that the people of America demanded a conviction?" "Tell *him* that!" was the reply. "I would as soon have gone to Herschel, and told him that the people of America insisted that the moon had horns as a reason why he should draw her with them."

Marshall's personal traits were winning. Nothing seemed to disturb his temper or equanimity. His manners on the bench were a model of dignity, simplicity and courtesy. He heard the arguments of counsel with unsurpassed patience and strict attention. "The gravity of the judge was tempered with the courtesy of the gentleman."

An English traveler gives us a touching picture of the Chief Justice during his last days: "The Judge is a tall, venerable man, about eighty years of age, his hair tied in a queue according to olden custom; and with a countenance indicating that simplicity of mind and benignity which so eminently distinguish his character. His house is small, and more humble in appearance than those of the average successful lawyers or merchants. I called three times upon him. There was no bell to the door. Once I turned the handle of it and walked in unannounced. On the other two occasions he had seen me coming and had lifted the latch and received me at the door, although he was at the time suffering from some very severe contusions received in the stage while traveling on the road from Fredericksburg to Richmond. I verily believe there is not a particle of vanity in his com-

position." Such was the man, simple, kindly, great — the noble attributes of true manhood.

Perhaps no tribute after his death is more beautiful than is expressed in the words: "The fame of the Chief Justice has justified the wisdom of the Constitution, and reconciled the jealousy of freedom to the independence of the judiciary."

The affection and veneration of the bar are feelingly shown by the resolutions adopted by the Circuit Court of Virginia, which declare that he had presided for thirty-five years "with such modesty that he seemed wholly unconscious of his own gigantic powers; with such equanimity, such benignity of temper, such amenity of manners, that not only none of the judges who sat with him on the bench, but no member of the bar, no officer of the court, no juror, no witness, no suitor, in a single instance, ever found or imagined, in anything said or done, or omitted by him, the slightest cause of offense."

The providence of God has been made manifest to this nation "in raising up from time to time men of pre-eminent goodness and wisdom"—Washington, Lincoln, Marshall, each fitted for his special work. The name and services of Marshall are less known because what he did lies more hidden from the eyes of men. But it only requires examination and reflection to reveal the incalculable value of his labors, and his title to the gratitude of his country. In the beautiful emblem of the nation which hangs from these historic walls it was by his hand the silken threads were woven into the folds in which are set and held forever those shining stars.

To comprehend Marshall's work we must stand upon the mountain top and survey the Nation; its cluster of proud States stretching from ocean to ocean; its groups of islands encircling the sea; its strings of great cities;

its countless towns and villages, farms and homes; its temples of worship on every hillside whose spires are the first to greet the morning sun at its coming; its schools and universities; its hospitals and charities; its commerce and arts; its science and invention; its industries and wealth,—the whole picture of national life which is spread before our vision.

Behold the change! We are no longer a feeble confederation of colonies fringing the Atlantic coast; but a mighty composite Republic standing in the front rank of nations, beckoning the poor and heavy burdened of other climes to this home of material comfort, civilization and orderly liberty; and marching to the financial and commercial supremacy of the world. Our political system is no longer threatened by discordant or belligerent States, but we behold a loyal, united and enduring Union,—the highest type of government, a Federal Commonwealth in its perfect form. We see no longer a weak and struggling national spirit, but the throb of seventy million patriotic hearts as the Maine sinks beneath the waters in Havana's harbor. The symbol of our country's power is no longer the frigate Constitution, or the wooden ships of Perry built in a night to cross an inland sea, but the majestic and invincible Oregon, traversing two oceans from Pacific's Golden Gate to battle for the oppressed of other lands and the nation's honor.

As we enter the gateway of a new century with hearts overflowing with gratitude to Almighty God for our unnumbered national blessings, and awaiting with high anticipation and conscious strength the grander destiny of the coming years, we may well pause to lay our wreath of laurel on the uncrowned head of the great jurist who sank deep and immovable the constitutional pillars on which the nation rests.



## STATE OF CONNECTICUT.

The law department of Yale University united with the Connecticut State Bar Association in the celebration of John Marshall Day. The exercises were held February 4, 1901, in the auditorium of the new Hendrie Hall, of the Yale University Law School, recently opened. Although the weather was very inclement, a large and representative assembly was present. Other details appear in the opening and introductory addresses given below. The principal address was delivered by Charles E. Perkins, President of the State Bar Association. There were also addresses delivered by Simeon E. Baldwin, of the Yale Law School and Justice of the Supreme Court of Connecticut, and by Nathaniel Shipman, of the United States Circuit Court, Second Circuit. After the address, Hendrie Hall was inspected and a plain refecton was served.<sup>1</sup>

### Opening Remarks by Francis Wayland, Dean of the Yale Law School.

It would seem almost an impertinence, before an audience of lawyers, lawyers *in presenti et in futuro*, if I should remind you that in the year 1899, at its annual session, the American Bar Association recommended the celebration of this day as the hundredth anniversary of the inauguration of John Marshall as Chief Justice of

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<sup>1</sup> The proceedings on Marshall Day in Connecticut were published in the Yale Law Journal, volume X, No. 3, March, 1901, pages 184 to 210.

the Supreme Court of the United States. And, by the way, it may interest us to recall the fact that his immediate predecessor in this high office was Oliver Ellsworth, of Connecticut.

The Bar Association also recommended the observance of this day by Congress, by the Supreme Court of the United States, by the Bar Associations of the different States, by Law Schools, and other educational institutions. Our own celebration combines the Law Department of Yale University and the State Bar Association, represented on this platform by its President, the orator of the day, and His Excellency, the Governor of the State. The Federal Judiciary is represented by Judge Shipman of the Circuit Court and our own Judge Townsend of the District Court; Yale University has manifested its cordial interest in the occasion by the attendance of President Hadley and a large number of the Faculty of the University.

It will be gratifying to you all to know that we have with us, as an honored and welcome guest, a grand-niece of the great Chief Justice. Two telegrams of to-day will interest you. The first one is addressed to Judge Baldwin in his capacity as the Mentor of the Law School and the recent President of the American Bar Association.

Illinois sends greeting to Connecticut and American Bench and Bar united in one American brotherhood on this historic day.

ADOLPH MOSES,

Chairman Associated Committee  
of Illinois for John Marshall Day.

To Mr. Moses, a prominent member of the bar of Chicago, is due the credit of having originated this idea. The reply is as follows:

Connecticut and Yale return salutation of Illinois. All honor to Marshall from our University, for he attended at William and Mary

the first university law course in America, and from our States, for he made their foundation sure.

FRANCIS WAYLAND,  
Dean of the Yale Law School.  
SIMEON E. BALDWIN,  
Member of National Committee  
on John Marshall Day.

And now it is my pleasant duty to call the Commander in-Chief to the front. I have the honor to introduce His Excellency, Governor McLean, who has kindly consented to act as our presiding officer.

**Introductory Address by His Excellency the Governor of Connecticut.**

I see that I am down for an introductory address; this is not according to agreement, and I presume that is why the good Dean, in the kindness of his heart, has already made an excellent one.

There are one or two thoughts, and only one or two, that I shall take time to express. I do not agree with Sarah Dowdney or Herbert that the mill will never grind again with the water that is past; the lines fascinate in their hopelessness only; they are not true; the mill may grind again and again with the water that is ever journeying from sky to earth and from earth to sky. And I do not agree with Shakespeare that it is the evil rather than the good that men do that lives after them. When a great man loves and labors and passes by the living his life returns ever to help and elevate succeeding generations, and the influence of that life gathers rather than loses energy with the years. Washington is dearer and Lincoln comes closer to the hearts of the people with every passing February; and we, to-day, have met to welcome, with re-

newed interest, the spirit of the man who stood with Washington and Hamilton and kept the bridge so valiantly in the brave days of old; defended and saved the Constitution from the assaults of error and envy, and laid the base of the pyramid of the Union in stuff that can never be moved or broken; it is with pleasure that I am here with you to hear of the great Chief Justice, and it is with great pleasure that I first present to you the President of the University, who needs no introduction to this audience.

**Address of Welcome by President Hadley.**

It is a matter of happy omen that the opening of the new Law School Building should come on a day so historic as this, and be graced by an assemblage so representative of all that is best in the State of Connecticut.

In behalf of Yale University I welcome the Law School on coming fully into its own. In behalf of Yale University and the Law School alike I welcome those members of the bar of the State, present and prospective, and those whose interest in the best work that is done on legal lines has brought them here.

We did not arrange the weather of the day, nor did John Marshall; and yet it is not without significance that to this audience is given an opportunity to prove that they care as little for the storms of adversity, in the weather at any rate, as did John Marshall himself.

But you are not come to listen to words such as you can hear every day. It gives me great pleasure to make way for a better man; for a man whose orations always ap-

peal to those who enjoy good, straightforward thinking, well expressed, and brought home to all the hearts and consciences of mankind.

GOVERNOR M'LEAN.

I now have the pleasure of introducing to you the President of the Connecticut Bar Association, Charles E. Perkins.

*Address Delivered by Charles E. Perkins.*

One hundred years ago to-day, John Marshall, of Virginia, took his seat as Chief Justice of the Supreme Court of the United States. To-day, throughout this country, meetings are being held in honor of his appointment, attended by the most eminent men; and there is a general feeling among the educated classes of our people, that the occasion is one that ought to be celebrated and kept in remembrance. There is something unusual about this. Such commemorations are usually confined to great generals, or great statesmen, such as Washington, Grant or Lincoln; men who have performed great deeds which have been the salvation of the nation, have made it what it is, or preserved it from destruction; why, then, should Marshall's appointment be so celebrated? It is because it is largely through him that these United States have become a Nation.

Great as he was, as a lawyer and a judge, ability in either respect would not have placed him in the position he now occupies, if it had not been for the circumstances in which he came to the bench. It was his construction of the Constitution of the United States, and the effect of his decisions, that made us a nation.

That Constitution is the most remarkable document that ever came from the minds of men. There had been republics and democracies before, and federations of various kinds; but in no other country, so far as I know, had there been a definite, written constitution by which they were governed. Even the Constitution of England, about which we have heard so much, is chiefly remarkable from the fact that it exists only in theory, and really has no binding force on the law-making power. But the problem which presented itself to the men of 1787 was not merely to frame a method of governing and administering one republic: that would have been comparatively easy; but here were thirteen distinct States or political organizations, each of which was as separate from the other, so far as influence or power over each other was concerned, as England is from France; differing in manners and customs, in views and opinions, more or less jealous of each other, and unwilling to lose their individual rights and authority.

These thirteen distinct sovereignties were to be so combined as to form one nation which was to be sovereign for certain purposes, and yet leave the States sovereign for all other purposes, and it was necessary for the convention to decide what powers should be reserved by the States, and what delegated by them to the new nation. This would have been difficult enough if the members of the convention had been broad-minded, intelligent, unprejudiced men, met together with no prepossessions, to determine on principle what would be best to do; for there were absolutely no precedents in history or experience to guide them; but this was by no means the case. The people in every State were divided into two parties, the principal difference between them being this very

question of what should be the relative powers of these respective governments. The Federalists, headed by Hamilton, desired to have a single nation of great power, almost like England; and to reduce the powers of the States as much as possible. The opposition, afterward called the Republican party, headed by Jefferson, and including many other men of great ability and strong and honest beliefs, desired to limit the power of the new government as much as possible, and to keep as much power in the States as they possibly could. Both these parties were largely represented in the convention by their best men.

The difficulty was, therefore, to frame a constitution which would satisfy all reasonable men of both parties, and be accepted by all the States, and yet would give to the new government such powers as were needed to make it of real benefit. It hardly seems possible that this could ever have been done, but it was done, and so well done, that although made for only thirteen States and a few millions of people, it has been found adequate and sufficient for forty-five States and over seventy millions of people; and it is even greater proof of the wisdom and foresight of these men, that with the exception of the ten amendments passed in 1791, and which have always been regarded as practically part of the Constitution itself, only two amendments, each of minor importance, were made until after the convulsions of the Civil War.

Neither of the two great parties was able to carry out its wishes in full; in some instances compromises were made; and the result was to bring about in many cases the use of broad general expressions which might be construed in different ways, rather than minute detailed

provisions. All the people, however, had learned from bitter experience during the Revolution, that a mere federation of the States without some power above them all would be insufficient; and the Constitution and ten amendments were finally adopted.

This, however, did not change the views and desires of the two great parties: the contest was only removed to a new field. It still became necessary to determine what the words used in the Constitution meant, and how it was to be interpreted. Those who had fought the battle for State sovereignty in the convention were still as ready and anxious to urge that the new government should have no powers that had not been clearly and expressly given to it, and that the expressions used should be so construed as to be restrained within the narrowest limits. The controversy was only removed from the Convention to another forum.

It was obvious that a mere written constitution, without some absolute authority to interpret it and decide what its meaning really was in relation to many intricate and embarrassing questions and to enforce its decisions, would be useless, and therefore some such authority must be provided. The most unique and remarkable feature in this instrument is the provision that the Supreme Court should be a tribunal which should decide all questions judicially arising under it, finally and absolutely, so as to bind both the States themselves and the United States; and having its decisions enforced, if necessary, by the whole power of the government. It was, I believe, the first instance of such a tribunal in all the history of civilized institutions. It is clear, too, that this makes the judiciary by far the greatest and most powerful of the three departments into which the powers of government



were divided. It has the power in all judicial controversies and cases to determine the validity of legislation, both of Congress and of the States, and to determine the powers and duties of the Executive; for it has the power to say what the words used in the Constitution and laws actually mean. The power of saying what words mean is greater than the power of selecting and phrasing the words; for it is the ideas which the words convey, and not the words themselves, which are important. To paraphrase a well known saying, "Let who will make the laws if I can construe them." This power is still greater in the case of a Constitution like ours, where of necessity, as well as for reasons already suggested, the expressions are broad and general, instead of detailed and definite.

It is the greatest possible tribute to the wisdom and respect for law of the people of the United States, that although the court has often exercised its great power, and has held many laws passed by Congress as well as by the States to be void, laws often of great importance, involving great interests, and affecting the feelings and views of large sections of the Union, its decisions have invariably been submitted to; not indeed without objection and disapproval, for that would be too much to expect of human nature, but without defiance and resistance.

This power in the court made the views of its members of the highest importance. They could so construe the words of the Constitution as to limit and restrain it within the narrowest bounds, or so as to expand and enlarge it, almost at will. To those of us who believe in a superintending Providence, it may be considered providential that John Marshall, at this crisis, was placed at the head of the court.

Nor was this a mere theoretical division of opinion between the two great parties; it was a vital and practical one. In the words of Marshall himself, in his *Life of Washington*, the country "was divided into two great political parties, the one of which contemplated America as a Nation, and labored incessantly to invest the Federal head with powers competent to the preservation of the Union. The other attached itself to the State government, viewed all the powers of Congress with jealousy, and assented reluctantly to measures which would enable the head to act in any respect independently of the members." This feeling was shown very strongly in the convention which framed the Constitution. Charles Pinckney, of South Carolina, introduced a draft of a Constitution commencing, "We, the people of the States of New Hampshire, Massachusetts," etc., enumerating all the thirteen States. If a Chief Justice, imbued with the latter opinions, had been in Marshall's place, the history of the United States would have been very different. Fortunately for us, John Marshall's views on this great question were so clear and strong as to fill his whole nature. As a soldier he had gone through that winter of starvation and frost at Valley Forge, where the disputes between the States composing the Confederation were such that the strongest appeals of Washington could not induce them to agree as to raising even money enough to warm, clothe, and feed the soldiers who were giving their lives for their protection. He had seen and felt the incompetency of that body, and when elected a member of the Virginia Convention, called to consider the adoption of the new Constitution, he urged its adoption with such power of argument and strength of reasoning, that, though opposed by many of the ablest men in the State, among

them Patrick Henry, he convinced the convention and secured its adoption.

With these convictions John Marshall assumed the position of Chief Justice and began that series of decisions which has placed him at least as high as any judge in any country. It is difficult for us now to imagine the difficulties of a judge in his position in the United States in 1801. To-day, with the thousands of volumes of American reports, text-books, digests, and other publications, he is either a poor or a lazy lawyer who cannot find some authority in his favor upon almost any question. But then the case was very different. At the time of Marshall's appointment there were just five volumes of American reports, Kirby and the first volume of Root in Connecticut, and three volumes of Dallas in Pennsylvania, none of which were published by authority of law. There were a number of English reports, but very many of the decisions were not adapted to our circumstances and institutions, and none of them binding on our courts. It was necessary to decide cases as they arose upon reason and general principles of law. While this was true of all legal questions, it was especially so when the court came to construe the Constitution. Not only were there no precedents, no decisions to aid, but there never could have been any, for no such instrument ever existed, nor any like it. The rules for its construction, and the construction itself, were to be found only in the minds of the judges; and the foundations and grounds of the decisions had to be based upon reason and sound sense. They must be so reasoned out and clearly expressed as to commend themselves to and convince the minds, not only of the bar, but of the people generally; and especially of those who had been strongly opposed to the adoption of the

Constitution, and were desirous of limiting the powers of government and of its courts to the utmost extent possible.

In view of the history of this nation, it is almost impossible for us to realize the fears and apprehensions of many men of ability and influence at that time. They seriously believed that there was danger of the absolute destruction of liberty and of State governments, and the establishment of a despotism worse than that of England had ever been. Even Patrick Henry declared that "unless some miraculous event happened the nation could not retain its liberty," and that the new government "would destroy the State governments, and swallow the liberties of the people;" and many others of great ability and fame agreed with him.

Yet, so strong was the reasoning, so unanswerable the deductions, and so clearly expressed were Marshall's decisions, that they seem to have convinced not only the people generally, but even those most opposed to his views. One of the first and all-important questions which arose, was as to the power of the Supreme Court to decide that laws either of Congress or of the States contrary to any provision of the Constitution were invalid. It will be noticed that no such power is directly given to that court. The Constitution only says that the judicial power shall extend to all cases arising under this Constitution, the laws of the United States, and treaties. . . .

In the celebrated case of *Marbury v. Madison*, Marshall declares the principle which lies at the foundation of his decisions upon the construction of the Constitution, and which is more fully stated in later cases, namely, that the United States is a nation, created by all the people of the United States acting together as one body; that the Con-

stitution is declared by all the people to be the supreme law of all of them; that the will of the people is supreme and must be obeyed, and consequently no law can exist or be made by any legislative body which is contrary to its provisions.

It is in this sense that we may say that Marshall was the creator of the nation, and deserves to be celebrated among those who have deserved well of their country; and it is largely for this reason that we here, as well as others elsewhere, are fully justified in commemorating John Marshall's Day.

I do not forget that there were other members of the court who should share in this praise. Marshall was but one of the six members who at that time formed the Supreme Court; but so great was his power and influence, so convincing his views and arguments, that his opinions were almost invariably adopted by all. From his pen came almost all the decisions on constitutional questions during his time, and there is, I think, but one such case, that of *Ogden v. Saunders*, where a majority, four out of the seven who then composed the court, disagreed with him, and that was only on one point which was not decisive of the case.

It would take a volume to give even a brief account of all of Marshall's opinions relating to the Constitution, and I shall not attempt to do so. Even a complete summary of the principal questions decided would be beyond my limits. During the thirty-five years that he filled the position of Chief Justice, almost every important question which could arise upon the construction of the Constitution was not only decided, but the decisions were based upon such sound reasoning that they have never been attacked. Some of the most important of these ques-

tions may be referred to. Among them were the power to regulate commerce between the States, and the power of the States over foreign commerce; how far the prohibition to the States of emitting bills of credit extended; the nature and obligation of contracts, and how far the States might affect them; the power in the State to tax creations of the Federal government; the power of the States over Federal officers; the power of the Supreme Court to revise the laws of the States, or the judgments of the State courts, and many others.

In all of these it must be remembered that then there were no precedents, no rules of decision to follow. They must all be reasoned out by the powers of the mind alone, and in the ability to do this Marshall was pre-eminent; in my opinion, above any other judge who ever lived. He has sometimes been called the Mansfield of America, but I believe that even Lord Mansfield, the most distinguished of English judges, if placed in Marshall's position, could not have filled it so well. There may have been other men who could have done what Marshall did; it is enough for us to say that no one else ever did. He fully and thoroughly believed that the whole people of the country intended by the Constitution to form a government of the whole country which would be supreme in the powers given to it, and in the authority to enforce them; which would represent the people of a nation, be accountable to them alone, and represent their sovereignty; and it was no more to be unduly limited in the exercise of its proper powers than to be unduly extended beyond them. With this foundation principle in his mind he studied the instrument as a whole, not in isolated parts, interpreting each provision by others so as to make a perfect and uniform system.

His principles of construction are admirably and concisely stated by himself in a leading case: "To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in the sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them nor contemplated by its framers, is to repeat what has already been said more at large, and is all that can be necessary."

Nor must we forget that while Marshall was resolved to extend the power of the nation to its proper limits, he was as careful not to extend it beyond those limits. His desires on this point are very clearly shown in the celebrated case of *McCulloch v. Maryland*, the question in which was the right of the State of Maryland to tax a branch of the United States Bank, a corporation created by Congress as a part of the financial administration of the government. The case was especially interesting as the United States claimed that the tax law of the State was invalid as contrary to the Constitution, and the State claimed that the Act of Congress creating the bank was invalid, as beyond the powers given to Congress. In his opinion, Marshall first discusses the last point. He admitted that the Constitution gave no express power to create a bank, in terms, but held that it existed as a part of the power "to make all laws that shall be necessary and proper to carry into execution the powers given to the government," saying "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional."

This, I believe, is the furthest extent to which Marshall ever carried the doctrine of powers not directly given by the Constitution, but only to be implied from it. That doctrine, first enunciated by him, has been questioned by those who may be called strict constructionists, and Marshall has been criticised and accused of unduly and improperly extending the powers of government. Of course, such a principle, like most others, may be carried to too great an extent. It will appear, however, to any unprejudiced observer of Marshall's opinions, and of the reasoning by which he establishes the doctrine, that it is an absolutely necessary one, without which not only the operations of the government would be seriously embarrassed, but almost destroyed. In the final analysis it will be seen that the real objection has always been to the application of the principle to particular instances, rather than to the principle itself.

Upon the other question in the case, it having been once established that the bank was a necessary and proper instrument to carry on the financial operations of the government, the want of power in the States to tax it was clear. That power, if it existed, might be carried so far as to destroy, which would be inconsistent with the power to create. Nowhere is Marshall's sound judgment better shown than in the manner in which he avoided both too broad and too narrow a construction of the Constitution. At the time of his appointment, one party believed that he would extend the power of the government to the extent desired by the most ardent Federalists; and on the other hand so reasonable a Federalist as Wolcott of Connecticut said that Marshall "would construe the Constitution like a penal statute." That he disappointed both his friends and his opponents, and laid down



principles of construction which have been approved and followed down to the present day, is the highest possible compliment to his sagacity.

But although it is his opinions on constitutional questions that have given Marshall his greatest fame, yet he showed no less ability as a judge upon all questions which arose in his time. It is wonderful to see how, after a practice of only twenty years at the bar before coming to the bench, questions arising in admiralty law, commercial law, land law, international law, every kind of question which could come before the court, were considered by him, and decided with a power of reasoning, a knowledge of authorities, and a clearness of expression which alone would have given him rank among the highest judges of the world. In many of these cases also, especially admiralty and prize cases, and cases arising under the embargo and non-intercourse acts, new questions continually arose for which there were no precedents, and in which it became necessary to determine broad general principles, and apply them to new and complicated facts, and sometimes to create the law itself. Many of the most difficult and important opinions on these subjects came from his pen, and where they were from those of others, the method of argument shows traces of the influence of his mind.

He showed the same ability in trying cases while holding the Circuit Courts. It appears that he had serious doubts as to the power of Congress to provide that Justices of the Supreme Court should be required to act as Judges of the Circuit Courts, but yielded his opinion to the views of the other justices and the practice before he was appointed.

The most important case in which he sat at the

circuit was the celebrated prosecution of Aaron Burr for treason, and here he showed not only his ability, but his courage and independence in asserting and maintaining the power of the courts, and withstanding public sentiment. This appears in his decision upon the memorable motion made by Burr's counsel for a *subpœna duces tecum*, addressed to Jefferson, then President, ordering him to produce upon the trial a letter written to him by General Wilkinson. Jefferson, who had a high opinion both of himself and his office, indignant at being treated like an ordinary witness, instructed the United States Attorney-General to resist the motion, and intimated very strongly that the court had no power to call upon him to bring State papers before it, and moreover that if the court should do so he would not obey.

It was a difficult position, for as the court was a United States court, only the authorities of the United States could be called upon to enforce its order, and they were completely in Jefferson's hands; but Marshall was equal to the occasion. He declared it to be his duty to issue the subpoena without regard to consequences, and so firm was he that Jefferson at last yielded, and sent the letter to the Attorney-General to be produced if necessary.

The same independence was shown in his rulings upon the trial. Whatever may be believed of Burr's real motives and objects, there was a strong feeling throughout the entire community that he was conspiring against the integrity of the Union. Jefferson firmly so believed, and all the power and influence which the government could command was exerted to obtain Burr's conviction. Curiously enough the case turned upon the question of the admissibility of evidence. The overt act of treason alleged in the indictment was the levying of war against

the United States at Blennerhassett's Island in the Ohio River. The prosecution having offered evidence to prove acts of other persons at the island, which it was claimed constituted levying war, then proposed to connect Burr with the transaction by collateral testimony, while admitting that he was not in fact present. This evidence was objected to as not admissible under the indictment, and it was seen at once that the case turned upon the admissibility of this evidence. Probably no question of evidence was ever argued so thoroughly and at such length. The discussion lasted a whole week; all of the eight able lawyers employed on the case were heard at full length, and the abstract of arguments, with the opinion of the court, occupies sixty printed pages of the report of the trial. In an elaborate opinion the Chief Justice declared the evidence inadmissible. That ended the prosecution, and the next day the jury, under the charge of the court, acquitted Burr.

In the language of Wirt, one of the counsel for the prosecution, "Marshall has stepped in between Burr and death." Nor was this decision made without full knowledge of the public feeling on the subject, which was more than hinted at by counsel, but the suggestion was met by words which may well be commended to the consideration of every judge. "That this court dares not usurp power," said he in his charge to the jury, "is most true. That this court dares not shrink from its duty is also true. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he have no choice in the case, if there be no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world,

he merits the contempt as well as the indignation of his country who can hesitate which to embrace."

The disappointment of the country at the result of the trial was great, and criticism upon the decision was severe, but Marshall was unmoved. He believed he had done his duty as a judge and was content to await the verdict of posterity, which has been that no State trial has ever been conducted with more impartial regard for the State and for the prisoner.

Sitting alone in the Circuit Courts, his finest qualities were perhaps more clearly shown than at the head of the Supreme Court. His serene dignity which imposed respect on all, his patience in listening, his comprehension of every point made, the accuracy of his rulings, and the clearness and correctness of his charges to the jury, made him as nearly a perfect judge as it is possible for a mere mortal man to be.

I have thus briefly, and most inadequately, touched upon the judicial career of this great man, which covered so many years and involved so much labor. His decisions, if printed together, would fill thirty or more volumes, and, for reasons I have referred to, required more time, thought, and labor than opinions generally do. Amid all this labor he found time to prepare a most complete and accurate Life of Washington, which he afterward revised for a second edition, besides preparing an edition for the use of schools. . . .

As a man, Marshall appears to have been as near perfection in disposition, habits, and conduct as it is possible for a mortal man to be. It is the universal testimony that from youth to his death he was one of the kindest and most warm-hearted of men. His honor and integrity were without the slightest stain. He had no vices and, I may

almost say, no weaknesses. In spite of his eminent talents, his high positions, and his great reputation, there was no tinge of conceit or trace of assumption. His family relations were all marked by the utmost kindness and affection. His charities were constant and great. He bore no malice toward those who offended or injured him. He was a sincere Christian and believed in and obeyed the commands of the Bible.

The death of Marshall touched the feelings of the whole great nation for which he had done so much, and which, in a sense, owed its existence as a nation to him. Throughout the country meetings were held, not only by the Bar, but by the public, and the ablest men in the country pronounced eulogies upon his character. Among them we find the names of Webster, Kent, Story, Binney, Sergeant, and many others. They were unanimous in their respect for his abilities and great services, and all expressed the greatest admiration and love for the man. One of the most striking passages I find in one of the resolutions of the Bar of Charleston, South Carolina, of all the States the one most opposed to Marshall's opinions as to the proper construction of the Constitution. It is as follows: "Though his authority as Chief Justice of the United States was protracted far beyond the ordinary term of public life, no man dared covet his place or express a wish to see it filled by another. Even the spirit of party respected the unsullied purity of the Judge; and the fame of the Chief Justice has justified the wisdom of the Constitution, and reconciled the jealousy of freedom to the independence of the judiciary."

A study of the character and life of Marshall would be beneficial to any one as an example to be followed, but to none so much as to those who have just been, or are

about to be, admitted to the Bar. It does not come to all of us to be judges, nor to those who are judges, whatever may be their talents, does the opportunity come to rival Marshall's great fame. But every one of us may hold him up before us as an example, and feel that the nearer we can conform our lives and conduct to his, the nearer we shall come to the highest perfection of the man, the lawyer, and the judge.

**Address by Simeon E. Baldwin.**

There is something very impressive in this gathering. The Bar of Connecticut is here, but it is not simply a gathering of the Bar. The State is here in the presence of His Excellency the Governor, but it is not simply a gathering in the name of the State, for you meet within the walls of the great University of Connecticut, which is yet more than the University of Connecticut. Here she has her home, but where, where are the bounds of the influence of Yale?

And why is it that the University on this occasion here in Connecticut, and at Harvard also, meets the Bar and the State to celebrate this day?

There are two reasons: first, that the University, the modern University in America, makes a large part of her life work the teaching of political science, and that all thoughtful students of political science have come to feel that, in governments under written constitutions like ours, the safety of the State depends upon the intelligence and firmness of the judiciary; and John Marshall stands, more than any other man, for the judiciary of America.

And the second reason is that Marshall was one of the

first-born sons of the American Law School. We owe it to Jefferson that the first University course in law offered in America was given at William and Mary College during the stirring days of the Revolution. It was in 1779 that Jefferson, revolutionizing the curriculum of William and Mary, striking out chairs he deemed superfluous, brought in the chair of the law of nature and the law of nations and municipal law, and appointed to fill it one of the greatest judges whom Virginia has ever produced, Chancellor Wythe, a signer of the Declaration of Independence.

Marshall was then an officer in the Continental Army. He had begun the study of law at eighteen. He had pursued it for a year or two in a country office, then entered the army, and during a temporary lull in the war came to William and Mary to be one of the first class under Chancellor Wythe. The country owes a great debt to Wythe and to Jefferson for having given this young law student the opportunity of learning, not only the municipal law of Virginia, which almost any one could teach, but the law of nature and of nations, which few could teach, but which Wythe could.

Much has been said and justly said in the press as this celebration drew on, and has been said to-day, of Marshall as a constitutional lawyer. I am not sure but his work for American law was even greater as a judge, in shaping what by us was to be accepted as international law. The number of causes involving constitutional points decided while Marshall was on the bench was about sixty. The number of causes turning on points of international law decided during the same period was over one hundred, and they were important questions and serious questions.

The judiciary of a country like ours, where the Judiciary is independent of the Executive, is a great power in making for war or in making for peace, with respect to its power to decide questions of international meaning,—prize cases; cases such as the Behring Sea controversy recently called forth. Marshall's maiden opinion was one turning on international law, in the case of *The Amelia*, delivered at the August term of the court in 1801. At least three doubtful points of international law, involving the rights of neutrals, came before him in that case, and the decision gave form and precision where form and precision before had been wanting. And that was but the first, as I have said, of a long line. I might weary you with speaking of the points that Marshall made clear which before were not, in the field of the laws of nations; but let me say this: The highest court in England, not many years ago, having occasion to consider the rights of a foreign sovereign as to property coming on English soil, said that any student, any judge, who had occasion to investigate that question, must go first to the opinion of Chief Justice Marshall of the United States, in the case of *The Exchange*.

Marshall, then, won his spurs as a judge, not simply as a constitutional lawyer, but as an international lawyer.

And now let me say another thing with reference to why this University may welcome and celebrate this day. It has been the tradition of this University in organizing its Law Department not to shut its doors against those who are not college graduates. If John Marshall were to come to-day to some law schools in the United States, as he was at twenty-four, he could not enter, because he was not a college graduate.

The college can do much for a man. The college can



lift, broaden, inspire, but it cannot create the native faculty. After all, the native faculty that is in the man is the real title to permanent and lasting success.

And so I say, Marshall came to William and Mary as to a University, untrained by college, undisciplined by college life; but well disciplined by patient reading, by deep thought, by participation in the school of life during those stirring days of the Revolution. By the camp-fires of Valley Forge, in the watches of the night, in quiet thought, in solitary meditation he had educated himself; and the man that does that and does it well has done more for himself than even a college could.

Mention has been made of the contest between Marshall and Jefferson in the case of Burr. Jefferson was no friend to Marshall, and yet he was his best friend, for it was Jefferson, as I have said, who, by revolutionizing the curriculum of William and Mary, made it possible for Marshall to study into the real foundations of the law. It was Jefferson in that way who made possible Marshall's great career—a career called great not only by Americans, but wherever international law is known and respected.

**Address by Nathaniel Shipman.**

The analyses, by Mr. Perkins and by Judge Baldwin, of the constitutional law of this country, which Judge Marshall created, and his contribution to the international law of the civilized world, leave nothing to be said upon those subjects.

In the development of the system of common law, and of equity, which our ancestors brought with them from their English homes, and to which they adhered with respect, and sometimes with reverence, the Chief Justice

was forcibly logical, and forever instructive. Not to go into details, the trial of Aaron Burr, to which Mr. Perkins has alluded, is a classic never equaled and not yet approached. The unerring self-control by which the presiding judge mentally rose above the mists and miasma of popular excitement, and the clearness of judgment which fastened upon and grappled with the central fact of the case, were never more perfectly exhibited than in the trial of Colonel Burr; and upon that trial alone Marshall's reputation as a great judge could safely rest.

There are two things which I want to say about Marshall's judicial career. The first is this: After studying his opinions, and before reading either his biographies or any essays upon his character, every student from 1801 to the present moment has been struck by the singular simplicity and clearness of statement and by the naturalness of the argument of the great Chief Justice. As the student advances from sentence to sentence, he says to himself, "Of course that proposition is true and is self-evident; I could have thought that, and I could have said it," until, when he has finished, and has taken in the massive force and power of the linked and completed argument, then he says, "This is, as an exhibition of mental strength, incomparable."

The second thing is Marshall's insight into the nature of our dual system of government, and his foresight of the dangers from lax theories in regard to the supremacy of the Federal government in its own realm. One of his successors on the Bench, Justice Daniel, also from Virginia, who, as Justice Brown has told us, wrote eighty-four opinions and dissented a hundred and eleven times during the nineteen years that he occupied the position, generally spoke of the communities now constituting

the States of the Confederacy, and described the Federal government as a creature or agent of the States. In the mind of Marshall, who, somebody has said, was a priceless legacy of the dying Federalist party to the country, and who understood and appreciated and abhorred the idea of a confederacy, these theories of the Justice Daniel class condemned the country to perpetual weakness and impotence.

The present working, efficient capacity of the Constitution, the strength of the power and dignity which the Federal government now possesses, are due to Marshall's wisdom and foresight. If a man of narrow theories, or of weak courage, had been Chief Justice when *Cohens v. Virginia* was decided, the country would have been a petty, third-rate power, with not much more vigor and capability of expansion than it had under the Articles of Confederation. Marshall's comprehension of the powers of the Federal government averted helpless paralysis, and enabled Justice Bradley to declare, in the *Siebold* case, that the government of the United States may, by reason of physical force exercised through its official agents, execute on every foot of American soil the powers and functions which belong to it. The same comprehension enabled President Cleveland, in response to the impudent demand of Governor Altgeld, to reply with grim earnestness that the United States would protect with its troops the mails of the United States against unlawful obstruction in the city of Chicago. It enabled Justice Brewer, in the *Debs* case, to demonstrate that the courts of the United States have also power to remove or restrain such obstructions, and to punish disobedience of its orders.

Now, gentlemen, just look at that triple set of decis-

ions which came either from the Supreme Court, or from the Attorney-General, and President Cleveland. The first, that the United States could, by its marshals and its peace officers, carry out upon every foot of soil the laws of the United States; the second, that it could use its troops to protect the property of the United States; and the third, that its courts would see to it that the functions of the United States were not to be suppressed or restrained by anarchistic force, or any other kind of force. Any weaker construction of the powers of the government would have resulted in the triumph of anarchy; and John Marshall, plain of speech and modest of manner, wrote for all time, upon a dozen quires of foolscap paper, the principles which made us a nation. . . .

The ultimate aim at which we are still striving is the truth, for truth is eternal and success is temporal. A lawyer must admit that the search in his profession is not, like that of a clergyman, after the noblest, highest verities which belong to man's spiritual nature; it is for the highest attainment in the relation of nations to each other, and in the ethics which govern human conduct and society; but we are in search of the truth, the truth which was revealed from time to time to Marshall by an almost instantaneous clearness of vision. It may be found by us after a more prolonged search, during which it is veiled for a time, but the object of us all, students and lawyers, whether judges or in other stations, is the same, to find the truth and proclaim rightness. In that quest, gentlemen, we have paused to-day to pay tribute to the greatest leader of American lawyers, John Marshall.

## STATE OF NEW YORK.

The principal celebration in this State was held at Albany, in the Assembly Chamber of the State Capitol, at three P. M., under the joint auspices of the New York State Bar Association and the Association of the Bar of the City of New York. A large and distinguished audience of men and women was present, including the Chief Executive of the State, Governor Odell, the Chief Judge and Associate Judges of the Court of Appeals in their robes, and other members of the Federal and State judiciary, members of the Legislature, and a large number of the members of the Bar, including many of the Committee of One Hundred appointed by the Association of the Bar of the City of New York specially to attend the celebration.<sup>1</sup> After appropriate musical selections rendered by an orchestra, the Reverend A. V. V. Raymond, President of Union College, opened the proceedings with prayer.

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<sup>1</sup> The names of the Committee of One Hundred are as follows:

### COMMITTEE APPOINTED TO REPRESENT THE ASSOCIATION ON FEBRUARY 4, 1901.

#### *Ex-Presidents:*

William M. Everts,  
William Allen Butler,

James C. Carter,  
Frederic R. Coudert,  
Wheeler H. Peckham,

Joseph H. Choate,  
Joseph Larocque.

#### *Officers, Standing Committees and Members of the Association.*

Avery D. Andrews  
Courtland V. Anable  
Henry DeForest Baldwin  
John A. Beall  
Charles K. Beekman  
Lucius H. Beers  
Samuel R. Betts

Abel E. Blackmar  
Ophias Brainerd  
Silas B. Brownell  
Augustus C. Brown  
Alfred S. Brown  
Charles C. Burlingham  
Charles H. Butler

James Byrne  
John L. Cadwalader  
Michael H. Cardoso  
John H. Cole  
William N. Cohen  
George S. Coleman  
Frederick H. Comstock

William B. Hornblower, as President of the New York State Bar Association, and at the request of John E. Parsons, President of the Association of the Bar of the City of New York, introduced, with the following remarks, as the presiding officer, Mr. Chief Judge Alton B. Parker:

**Address of Mr. Hornblower.**

As this celebration is held under the joint auspices of the New York State Bar Association and of the Bar Association of the City of New York, it devolves upon me, in my official character as President of the State Bar Association, to welcome you and to introduce the presiding officer of this occasion. In so doing, I shall not undertake to usurp the functions of the presiding officer and of the orator of the day by eulogizing John Marshall. It is

Theodore Connolly	Lewis Cass Ledyard	B. Aymar Sands
William E. Curtis	Franklin B. Lord	John M. Scribner
William J. Curtis	Robert Lee Luce	Lawrence E. Sexton
Paul D. Cravath	Howard Mansfield	John S. Sheppard
Lewis L. Delafield	H. Snowden Marshall	John W. Simpson
Robert W. DeForest	Newell Martin	Eugene Smith
George G. DeWitt	David McClure	S. Sidney Smith
William P. Dixon	Payson Merrill	Herbert C. Smyth
Edward F. Dwight	Jacob F. Miller	Albert Stickney
Walter D. Edmonds	R. Burnham Moffat	William E. Stiger
Abraham I. Elkus	Robert G. Monroe	Henry L. Stimson
James R. Ely	John McLain Nash	Henry W. Taft
A. Leo Everett	Edward D. O'Brien	William L. Turner
John Frankenheimer	John C. O'Connor	C. Willett Van Nest
John A. Garver	Hamilton Odell	Howard Van Sinderen
Lawrence Godkin	David B. Ogden	James M. Varnum
Almon Goodwin	Peter B. Olney	J. Mayhew Wainwright
Charles H. Gould	Samuel H. Ordway	Henry Galbraith Ward
Robert L. Harrison	John E. Parsons	John De Witt Warner
Lewis S. Haslam	Charles A. Peabody, Jr.	John A. Weekes
James W. Hawes	Edward C. Perkins	Everett P. Wheeler
Job E. Hedges	John M. Perry	Edwin B. Whitney
Edward C. Henderson	Eugene A. Philbin	David Wilcox
Charles M. Hough	Mark W. Potter	Stephen G. Williams
Charles Bulkley Hubbell	Harrington Putnam	Bronson Winthrop
Charles H. Hughes	Thomas N. Rhinelander	John S. Wise
Francis C. Huntington	Noah C. Rogers	Silas Wodell
Adrian H. Joline	Jordan J. Rollins	Edwin G. Worcester, Jr.
William A. Keener	William V. Rowe	Charles H. Young
George W. Kirchway	Horace Russell	George Zabriskie

**Committee on the Celebration.**

William B. Hornblower,      Allan W. Evarts,      Burton N. Harrison,  
Austen G. Fox,      John G. Agar.

sufficient for me to say that, while George Washington is recognized as the Father of his Country and Thomas Jefferson as the author of the Declaration of Independence and their names and deeds are household words with all Americans, the fame of John Marshall is more exclusively a professional fame among our own profession, and it is fitting that on this centennial anniversary of his accession to the bench and to the great office of Chief Justice of the United States an effort should be made on behalf of the Bar of the country to impress upon the minds of their fellow-citizens generally what they owe to this great jurist.

The Bar Association of the City of New York, through its Executive Committee, appointed a special committee to consider what action should be taken on their behalf. It seemed to them that the most fitting and dignified mode of celebrating the fame of the great Chief Justice would be by such an occasion as this, where the representatives of the Bar of this great State should come together in the capital of the State, presided over by the head of the State judiciary and addressed by one of the leaders of our State and Federal Bar. The Bar Association of the City of New York, therefore, instructed its Committee on Arrangements to co-operate with the State Bar Association in arranging for this celebration.

We are not here to celebrate the glory of a great warrior, although John Marshall participated in the War of the Revolution; we are not here to celebrate the fame of a great statesman, or a great diplomat, although Marshall was both; we are here, as lawyers, to celebrate the fame of a great lawyer and a great judge.

It is safe to say that no one man has left a greater impress, not only on the jurisprudence of the country, but

upon the very framework of our institutions, than John Marshall. While he did not make the Constitution of the United States, he shaped it by his powerful and lucid opinions and by his influence with the great court over which he presided. Indeed, it may almost be said that, if he did not make the Constitution, he saved it; for had he not assumed his office at the precise period when he did and delivered the magnificent series of opinions which came from his lips and from his pen, which welded together the sovereign and independent States of the Union and which armed the Federal Government with the power necessary to preserve our institutions while guarding the reserved rights of the States and the citizens thereof, the fair fabric which had been constructed by the Constitutional Convention of 1787 and which had been so unwillingly adopted by many of the States, notwithstanding the urgency of such men as Hamilton, Madison and Jay, would have fallen to pieces under the strain of the conflicting interests of its various constituents.

But all this will be told you much better than I can tell it by those who are to follow me. We are fortunate in having secured as the orator of the day that distinguished and able member of our Bar who served so acceptably and so usefully upon the Federal bench in the Eighth Circuit, and who is eminently qualified to portray the character and set forth the services of John Marshall.

It is appropriate that this celebration should be presided over by the head of the State judiciary, the Chief Judge of the Court of Appeals. The present incumbent of that high office was called to it by the people of the State at an unusually early age, and we trust that he will be continued by the suffrages of his fellow-citizens in that position until the revolving wheel of time shall have com-



pelled him to retire by reason of the age limit fixed by our Constitution. He is a worthy successor of his able predecessors, such men as Church and Folger and Ruger and Earl and Andrews, than whom no State can claim a more distinguished line of presiding officers for its highest court.

Ladies and gentlemen, I take pleasure in calling to preside over you upon this occasion the Chief Judge of the Court of Appeals of the State of New York, the Hon. Alton B. Parker.

Chief Judge Parker introduced the orator of the occasion as follows:

*Address of Mr. Chief Judge Parker.*

While I feel very grateful indeed to President Hornblower for the kindly words with which he has introduced me, I would have you to know that I appreciate that only that part of it is really deserved which implies an ambition to do my duty.

While not unmindful of Marshall's merits as a soldier, his success as an advocate, his achievements as a diplomat and his career as a statesman, it is, after all, his matchless services to the people of this country as Chief Justice during the more than thirty-four years that he discharged the duties of that great office that easily entitle his name to be placed above those of all the other great jurists of this country on its roll of fame.

Although the court had been in existence eleven years when he entered it, the opinion supporting the first decision declaring an act of Congress unconstitutional was written by him in *Marbury v. Madison*. This famous opinion, which asserted for the first time a principle

which lies at the very foundation of constitutional jurisprudence, was followed by about thirty-four other opinions, written by him in cases involving constitutional questions, through which it was demonstrated that the capacities of the Federal Constitution were equal to all the demands of the Government that could be properly made upon it.

One of his associates in the court for many years, Mr. Justice Story, spoke of these opinions after the death of the Chief Justice as "those exquisite judgments, the fruits of his own unassisted meditations, from which the Court has received so much honor." When we recall the names of the great jurists who were associated with Chief Justice Marshall, we are tempted to regard Mr. Justice Story's statement as a little too generous, and yet the records afford striking evidence of his commanding position among his brethren, for we find that he not only wrote more than three-fifths of all the opinions written on constitutional questions, but that every opinion save one in the first volume of Cranch's Reports, embracing the work of the court for two years, was written by him.

It is true that no other judge in this country ever had so great an opportunity, but it is at least doubtful whether any other of our great jurists would have proved so well fitted for it had the opportunity been presented to him which came to Chief Justice Marshall.

But, strong as was his common sense, comprehensive his mental grasp, irresistible his logic and indefatigable his industry, yet to him was not solely due those masterful opinions. Great lawyers like Webster, Pinkney, Wirt, Dexter and others famous at the bar of that Court contributed by their illumination of the questions in-

volved to the glorious results achieved, just as their brethren at the Bar have contributed to every judicial decision tending toward either the harmonious working out of our scheme of government or the safeguarding of the liberties of the citizen. In the same general direction the future — perhaps the immediate future — is likely to present questions of momentous public importance; for a careful observer of the tendency of the times must appreciate that other and very different constitutional questions than those passed on in Chief Justice Marshall's time will probably be presented to both Federal and State courts. Indeed, there are now pending in the Supreme Court of the United States governmental questions of far-reaching importance that were probably not even thought of in Chief Justice Marshall's day.

It is therefore not only just to the memory of the great jurist that we meet in recognition of our indebtedness as a people for his wise and brilliant services during the formative period of our governmental development, but it is also wise for us, in view of the problems that the future has in store, to turn aside from our usual labors for a little while to study the great masterpieces of his judicial work and recount his glorious achievements, to the end that both the Bench and the Bar may be stimulated to emulate his example by patriotically striving to have the great questions of the future disposed of as they shall arise by decisions resting upon broad and solid foundations.

I have the pleasure of introducing to you one who has achieved distinction both on the Bench and at the Bar — the Hon. John F. Dillon, who will now address you.

**Address of John F. Dillon.<sup>1</sup>**

A figure heroic, majestic, supereminent, venerable and venerated, holding an unchallenged primacy in our legal, juridical and constitutional history, is that of John Marshall. When we refer to him in the Supreme Court, or when elsewhere we refer to that court, it is not necessary to name Marshall—we distinguish him by the title of “the Great Chief Justice.” He has no parallel but himself, and, like the Saladin in Dante’s vivid picture of the immortals, he stands by himself apart. Pinkney’s saying is well known—that Marshall was born to be the Chief Justice of any country in which Providence should cast his lot; and he came to his own one hundred years ago this day, when, at the first term of the Supreme Court ever held in the new Federal city of Washington, he put on his robes of office, took the oath to support the Constitution (and well he kept it), and assumed his place

<sup>1</sup> This address, entitled “A Commemorative Address on Chief Justice Marshall,” is reprinted from the 24th Annual Report of the New York State Bar Association for 1901. There was prefixed to the address, in the official pamphlet containing the Marshall Day proceedings, published by the State Bar Association, the following mottoes:

“The Constitution of the United States is a written instrument; a recorded fundamental law; it is the bond, and the only bond, of the Union of these States; it is all that gives us a National Character.”— DANIEL WEBSTER.

“No other man did half so much as Marshall, either to develop the Constitution by expounding it, or to secure for the judiciary its rightful place in the government as the living voice of the Constitution. . . . The Constitution seemed not so much to rise under his hands to its full stature, as to be gradually unveiled by him till it stood revealed in the harmonious perfection of the form which its framers had designed. That admirable flexibility and capacity for growth which characterize it beyond all other rigid or supreme Constitutions is largely due to him, yet not more to his courage than

at the head of a tribunal which, in its short existence of eleven years, had already had four Chief Justices. What a wonderful transformation. He found the place one that no great lawyer coveted; he left it, after a continuous service of thirty-four years, the most commanding, the most exalted, the most illustrious judicial office the world has ever seen. These are not words of professional enthusiasm or patriotic zeal, but are (as I trust this address will show) words of truth and soberness.

John Jay, in 1795, on being elected Governor of New York, resigned as Chief Justice, and Rutledge not having been confirmed, and Cushing having declined, Ellsworth was appointed in March, 1796. Ellsworth having served until October, 1799, and being commissioned as one of the Envoys Extraordinary to France, resigned the Chief Justiceship from Paris in November, 1800. President Adams, without consulting Jay, again nominated him to

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to his caution."—BRYCE, *American Commonwealth*, Vol. I, pp. 261, 375.

"When, indeed, I look back upon your judicial labors during a period of thirty-two years, it is difficult to suppress astonishment at their extent and variety, and at the exact learning, the profound reasoning and the solid principles which they everywhere display. Other judges have attained an elevated reputation by similar labors in a single department of jurisprudence. But in one department (it need scarcely be said that I allude to that of constitutional law) the common consent of your countrymen has admitted you to stand without a rival. Posterity will assuredly confirm, by its deliberate award, what the present age has approved as an act of undisputed justice."—Mr. Justice STORY in the Dedication, 1833, of his work on the *Constitution to MARSHALL. Life and Letters of Story*, Vol. II, p. 183.

The address also appeared in the *Albany Law Journal*, for March, 1901, volume 63, page 88; and in the *American Law Review* for March-April, 1901, volume xxxv, page 161.

be Chief Justice, and he was confirmed in December, 1800. Mr. Adams strongly urged him to take the place, saying: "Nothing will cheer the hopes of the best men so much as your acceptance of this appointment. You have now a great opportunity to render a most signal service to your country."<sup>1</sup> In his letter of declination to President Adams, Jay gave his reasons in language like a wail of despair. "I left the bench," said this eminent man and patriot, "perfectly convinced that under a system so defective it would not obtain the energy, weight and dignity which was essential to its affording due support to the national government; nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess. Hence I am induced to doubt both the propriety and expediency of my returning to the bench under the present system. . . . Independently of these considerations, the state of my health removes every doubt."

This letter was written January 2, 1801, and on the twentieth of the same month Marshall was nominated by President Adams and unanimously confirmed. Concerning this appointment, the youngest son of Marshall, in a letter which was not published until recently, relates that in 1825 he visited Mr. Adams at Quincy. What occurred is very characteristic of the second President. "He gave me," says Edward C. Marshall, "a most cordial reception, and, grasping my hands, told me that his gift of Mr. John Marshall to the people of the United States was the proudest act of his life." The son adds this interesting particular: "Some years after this my father told me that the appointment was a great surprise to him, but afforded him the highest gratification, as, with his tastes, he pre-

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<sup>1</sup> Carson, *Hist. Sup. Court*, p. 191.

ferred to be Chief Justice to being President.”<sup>1</sup> And so, with the century then just opened, John Marshall, February 4, 1801, took his seat for the first time as Chief Justice of the Supreme Court of the United States, and held the place until his death, July 6, 1835.

When Marshall became Chief Justice the American Union had sixteen States—a territory of 900,000 square miles, with a population, in round numbers, of 5,000,000—far less than the present population of this Empire State of New York. In the century that has since elapsed, the States, under the stimulus and protection of republican institutions, have increased from sixteen to forty-five, our territorial area—now facing both of the great oceans for many thousand miles—has more than quadrupled, and the recent national census shows our population to exceed 76,000,000 of people—free, happy, prosperous and united. These in this western world are the marvelous fruits of American institutions—“broad-based upon the people’s will,”—and we owe it all, with the favor of heaven, to the union of these States under the Federal Constitution. This amazing, this unexampled growth—I weigh the word—this growth, unexampled in the history of the world, has been under the Constitution without substantial change in its original plan or essential features, for the amendments adopted soon after the Constitution went into effect and those which were afterwards rendered necessary as the result of the Civil War did not alter the general scope or plan of the Union, although the latter amendments enlarged somewhat the powers of the general government and abridged in cer-

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<sup>1</sup> Magruder's *Life of Marshall*, 164.

tain specified and most important respects the powers of the States.

It is one of the remarkable phenomena of our history that this national development has been possible under a written constitution without successive revisions and changes having been found needful in order to adapt it to circumstances and conditions so novel and surprising, and which no sagacity could have foreseen or imagined. It belongs to this hour, in part, to inquire into the causes of results at once so extraordinary and so fortunate.

On an occasion like the present the temptation is to give a free reign to our praise, and not to estimate with judicial calmness the language in which the eulogy is pronounced. In the case of Marshall we have the paradox that the most effective eulogy is to give it the force which comes from restraint and under-statement. Contemporary mists have cleared away, revealing more distinctly Marshall's mountainous magnitude—"like Teneriff or Atlas unremoved." We can form to-day a juster estimate of Marshall and of his public services to our profession and to our country, and of his claims on our gratitude and veneration, than was possible for his contemporaries.

On the recommendation of the American Bar Association, the Bar of the United States at the City of Washington and in the different States are celebrating this day in honor of the centennial anniversary of the commencement of the judicial term of Chief Justice Marshall. Its observance was recommended in the annual message of the President. The spontaneous and voluntary character of this homage, on the part of lawyers and laymen throughout the entire country, gives to it its chiefest



value. It is, indeed, a most gratifying spectacle. It is in itself a eulogy more impressive than any words, however eloquent. The universality and warmth of the commemoration are the more remarkable since Marshall's life, though full of interest, arising from his long career in varied military, civil and public employments, and the signal ability with which he discharged their respective duties, has yet little, except the trial of Burr, that is striking and dramatic.

And now the inquiry fitly comes, whether this veneration for Marshall is a mistaken and superstitious idolatry or whether it rests upon rational, solid and enduring grounds. And, if the latter, what are these grounds and what is the just measure of Marshall's fame and of our indebtedness to him. To this inquiry our thoughts will mainly be directed.

The purpose of this occasion being to commemorate the judicial services of Marshall, this determines the character and scope of the present address. The general incidents of Marshall's life belong to his biography, and will be referred to by me very briefly, and only because they throw light upon the formation and character of the principles which he afterwards embodied in his celebrated decisions relating to the constitutional powers of the General Government.

Marshall, as I have already said, had rendered great public services before he went upon the bench. He was for years a soldier of the Revolution. He was engaged in numerous battles. He was present during the terrible winter at Valley Forge. He often acted as judge-advocate, and was well acquainted with Washington, whose

biographer he became, and with Hamilton, whose talents he admired and whose political principles he approved. He was a self-made man. He never had the advantages of a regular and systematic education. He was graduated from no institution of learning. His professional training was so desultory and irregular that it is a marvel to this day how, under such circumstances, he acquired such a thorough knowledge of the principles of his profession. He was repeatedly elected to the Legislature of his State in the critical period of our history between 1782 and 1792, not because he desired it, but because he was too patriotic to refuse. He had seen the fatal defects and the pitiable failure of the Articles of Confederation, and the bankruptcy of the new government and the public and private distress. Anarchy and chaos stared the people in the face, and Marshall was fully convinced that nothing but a firmer Union could save the country. Under the Confederation no remedy was possible.

When the adoption of the Constitution hung trembling in the balance, he became, in 1788, at the age of thirty-three, a member of the Virginia Convention called to adopt or reject the Constitution, and, with Pendleton, Madison and Randolph, championed its ratification against Patrick Henry, George Mason and William Grayson. The history of that struggle has been made familiar to lawyers by the glowing and pictured pages of Wirt's Henry, and to the world by Bancroft, Fiske and other historians. Madison was the acknowledged chief, but Marshall took a leading part, and some of his speeches which have been preserved are strongly marked by the same intellectual qualities for which he was afterwards so distinguished. The contest raged for more than three weeks, and in the end the vote, June 25, 1788, in favor

of the Constitution was carried by the narrow majority of only ten, eighty-nine against seventy-nine, and even this was delayed until nine out of the thirteen States (the requisite number to establish the Constitution between the States ratifying the same) had assented to it.

In New York the Constitution was in greater peril. New York was more tardy than Virginia. Hamilton saved the day, and the Constitution was ratified at Poughkeepsie, July twenty-sixth, by a majority of but three votes, thirty to twenty-seven. If any historical fact is certain, it is that this result saved the Union, for the Northern and Southern assenting States could not have existed separated by the State of New York; and New York's assent to the Union is due to the genius, writings and labors of Hamilton.

For the five years succeeding 1792 Marshall was in full practice at the Bar and went to the head. He warmly advocated Jay's treaty, unpopular as it was in Virginia. He supported the government in its controversy with France. In 1797 he accepted a joint mission to that country, serving with Cotesworth Pinckney and Elbridge Gerry. He had a year's experience with the almost incredible sinuosities, duplicities and insolences of Talleyrand's diplomacy, and his services, as Adams declared, "were entirely satisfactory and ought to be marked with the most decided approbation of the public." And they were.

He declined a seat on the Supreme Bench in order, at Washington's request, to serve his country in Congress. War with France being then imminent, Washington had been unanimously appointed, July 3, 1798, Lieutenant-General and Commander-in-Chief of the armies raised and to be raised in the United States. Marshall's first service in Congress was the mournful one of announcing

the death of Washington. He defended the rightfulness of the surrender of Nash by the President in a speech so conclusively reasoned that it was unanswerable. Adams appointed him Secretary of State, and he was exercising the important, and at that juncture extremely delicate, duties of this office January 31, 1801, when he was commissioned, at the age of forty-five, to be Chief Justice of the Supreme Court.

I have given this outline sketch of Marshall to show whence his political opinions were formed, and that his whole life, public and professional, was a preparation for the greater and more difficult duties and responsibilities of the judicial career on which he was about to enter. On this point we have his own interesting statement. Years afterwards he said: "I ascribe my devotion to the Union and to a government competent to its preservation to sentiments which I imbibed when in the army so thoroughly that they constituted a part of my being." "My legislative experience gave a high value to that article in the Constitution which imposes restrictions on the States. I was consequently a determined advocate for its adoption. . . . I was convinced that no safe or permanent remedy could be found but in a more efficient and better organized general government."

This tells the whole story. It might stand as a syllabus to all of his great constitutional judgments.

That during Marshall's chief justiceship he was the leader of the bench, and that his dominating intellect carried the other judges with him, is the general and popular belief, and it is one which is well founded.<sup>1</sup>

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<sup>1</sup> Hitchcock, *Const. Hist. of U. S.*, p. 57; table of cases, *Ibid.*, pp. 118-120; Carson, *Hist. Sup. Court*, p. 286.

The Chief Justice had the good fortune to have, on the whole, able associates, some of them very eminent. But he was the planetary center of the court, holding every orb in place, giving, and, in turn receiving back, "the gladsome light" which has made that tribunal so resplendent. Mr. Justice Story sat at Marshall's side for twenty-four years. No one had better opportunities of knowing Marshall's relation to the labors of the court than Story, and no one, certainly, was capable of forming a juster estimate of them. When such a lawyer and judge as Story looks up to Marshall and publicly salutes him as master, no more impressive proof is possible of Marshall's intellectual greatness and supremacy.

To appreciate Marshall justly we must view him against the sombre background of an untried and most difficult situation. The controversies which the progress of the formation and adoption of the Constitution had made manifest, survived and took on a partisan form. A written constitution as an organic law for a government of novel and complex construction, whose powers and limitations were expressed in the most general language, required to be interpreted, expounded and applied for the first time. For a situation so absolutely unique, precedents and authorities there were none. The usual and most useful function of a judge is, by careful study, to ascertain from the sages of his profession, and from the opinions and judgments of the courts, what the law is, and to declare and apply it faithfully and without innovation to the case in hand. He has the accumulated and recorded wisdom of ages as an unfailing and sacred deposit from which to draw the principles which are to guide his inquiries, enlighten his understanding and de-

termine his judgment. But no such resource was open to Marshall in the decision of the new questions of Federal authority and right arising under the Constitution of the United States, and he was, from necessity, thrown back almost wholly upon his own native powers.<sup>1</sup>

Men of our profession are apt to distrust generalities and to demand specifications and proofs. Appreciating that with them specific and concrete examples are more effective than general unsupported statements, I have, with some hesitation, lest I should drift into too much detail and prolixity, concluded that the nature and value of Marshall's judicial services can only be satisfactorily shown by selecting and briefly stating a few of his leading judgments which determined the boundaries and established the vital and fundamental principles of our Constitution.

This was his distinctive work. On this his fame chiefly rests. Before Agamemnon there were many heroes. There are in English and American jurisprudence many great judges. Aside from Marshall's services as the main creator of Federal constitutional law there are English and American judges, not a few, who have as wide or a wider fame than Marshall. I may mention among his contemporaries in this country Story, Shaw and Kent.

Having mentioned Chancellor Kent, perhaps you will give me leave, in this capital city and before the Bar of his State, to repeat what I have elsewhere said concerning him. It is not inappropriate to this occasion. "As a judge and author, he will not suffer when compared with the greatest names which have adorned the English law. . . . The American Bar and people venerate

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<sup>1</sup> 112 United States Reports, 745, per Waite, C. J. [See *post*, Vol. III, 402.]

his name and character. Simple as a child in his tastes and habits throughout his tranquil and useful life; more than any other judge the creator of the equity system of this country; the author of Commentaries which, in accuracy and learning, in elegance, purity and vigor of style, rival those of Sir William Blackstone, his name is admired, his writings prized, and his judgments at law and in equity respected in every quarter of the globe wherever, in its widening conquest, the English language has carried the English law."<sup>1</sup> No writer has considered the respective powers and duties of the Federal and State judiciaries so satisfactorily as Chancellor Kent, whose chapters on that subject are characterized by precision, justness and elegance. Although his judicial labors were mainly confined to objects of local jurisdiction, yet he pointed out that there was enough in them to cheer and animate the cultivation of the jurisprudence of the States, saying: "The vast field of the law of property, the very extensive head of equity jurisdiction, and the principal rights and duties which flow from our civil and domestic relations, fall within the control, and, we might almost say, the exclusive cognizance of the State governments. We look essentially to the State courts for protection to all these momentous interests. They touch, in their operation, every chord of human sympathy, and control our best destinies."

Such is the general regard for him, as man, judge and author, that it will, I am sure, be permitted on this occasion to suggest that at some suitable time, under the auspices of the Bar Associations, we shall have a James Kent Day, in order that we may suitably make manifest our appreciation of the great services which he rendered

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<sup>1</sup> *Laws and Jurisprudence of England and America*, p. 879.

to general jurisprudence, and particularly to the jurisprudence of the State of New York, and this in the hope that it may result in the erection of a statue, in honor of his memory, either here in the capital city, where he labored so long, or in the city of New York, where he died. I cannot doubt that if application were made to the Legislature, it would lend its powerful sanction and authorize the Governor and Chief Judge of the Court of Appeals to select a suitable site on the Capitol grounds, which, if done, I am sure the Bar and the people of New York will furnish the means to place thereon a memorial worthy of the State, worthy of our profession and worthy of this distinguished jurist and judge. If I may be pardoned for venturing to express any mere personal feelings, I will add that I have often wished that my own life might be prolonged to see Chancellor Kent thus appropriately commemorated.

Unlike Kent, Marshall does not owe the eminence and renown which inspire the public honors of this day to services in the field of general jurisprudence, although these were great, but to his judicial work as the first and greatest expounder of the principles of the Federal Constitution. It has not been easy for me to find any single term which precisely and fully describes the labors of Marshall in this respect. He was indeed an expounder of the Constitution. But he was much more than a mere expounder. Mr. Webster, in his day, was called, and not unjustly, the great expounder of the Constitution.

In our jurisprudence, as Marshall left it, our Constitution means what the judicial department holds that it means. Marshall, in the course of his long service as Chief Justice, construed and expounded for the first time nearly all the leading provisions of the Constitution, and



2. That *mandamus* was an appropriate legal remedy to enforce the delivery of such a commission, and that the writ might issue from a court of competent jurisdiction against the Secretary of State, commanding him to deliver it. . . .

It is readily perceived that this was a question of far-reaching and permanent importance, since it necessarily involved a determination of the extent and limits, respectively, of the executive and judicial power. The question was novel. It had never before arisen in the Supreme Court and was of a nature which could not arise in any other country. It was deliberately considered and the court asserted the principle that public officers of the United States may be judicially compelled to perform any plain, specific, legal duty not political or discretionary in its character. Referring to Marbury's case, one of the greatest of constitutional judges in this country, the late Mr. Justice Miller, declared that "the immense importance of this decision [*Marbury v. Madison*], though in some respects *obiter*, since the court declared in the end that they had no jurisdiction of the case, may be appreciated when it is understood that the principles declared, which have never since been controverted, subjected the ministerial and executive officers of the government all over the country to the control of the courts in regard to the execution of a large part of their duties, and whose application to the very highest officers of the government, except, perhaps, the President, has been illustrated in numerous cases in the courts of the United States. In fact," he says, "its assertion or denial makes just the difference, as Marshall tersely said in that opinion, between 'a government of laws and a government of men.'"<sup>1</sup>

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<sup>1</sup> Historical Address upon the Supreme Court, Philadelphia, 1889; Miller on the Constitution, p. 386.

That is to say, if this is a government of laws, then the officers of the law must obey the law, and Marbury was entitled to the delivery of his commission. If it is a government of men, as distinguished from laws, it means that Marbury's legal rights might be conclusively decided by officers other than the judges and that they may be disregarded by such officers with impunity. It is proper, however, to remark that the expression that this is "a government of laws and not a government of men," was not original with Marshall, nor did it profess to be. Public men and statesmen of that day throughout the colonies were profound students of political principles, and this precise expression I have found in the Constitution of the State of Massachusetts, adopted in 1780.<sup>1</sup> Perhaps the diligent inquirer might trace its origin further back or elsewhere.<sup>2</sup> As we shall presently see, the power here asserted to issue process to an executive officer was violently controverted by Mr. Jefferson as long as he lived, and he always insisted that the decision on this point was not only not law, but that the opinion thereon was extra-judicial.

3. The case also decided for the first time in the Supreme Court of the United States that an act of Congress repugnant to the Constitution is void—observe, not voidable, but *void*—and that it is not only within the power, but it is also the duty, of the judicial department so to decide in any case properly before it involving the question. It is this point affirming the power and duty of the court to adjudge laws in conflict with the Constitution to be void that gives to that opinion, which has become

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<sup>1</sup> Part the First, Article XXX.

<sup>2</sup> See Harrington, *Oceana* (3d ed.), 336; Thayer, *Cases on Constitutional Law*, Vol. 1, p. 384.

the corner-stone of the constitutional law of this country, its vital and transcendent importance. Thus, Parsons says:

"I should not do justice to my own deliberate belief did I not say that I think this decision is not surpassed in the ability it displays, nor equaled in its utility, by any case in the multitudinous records of English or American jurisprudence."<sup>1</sup>

Chancellor Kent's observations are not the less striking. He says:

"This great question may be regarded as now finally settled, and I consider it to be one of the most interesting points in favor of constitutional liberty and of the security of property in this country that has ever been judicially determined. In *Marbury against Madison* this subject was brought under the consideration of the Supreme Court of the United States and received a clear and elaborate discussion. The power and duty of the judiciary to disregard an unconstitutional act of Congress, or of any State Legislature, were declared in an argument approaching to the precision and certainty of a mathematical demonstration."<sup>2</sup>

More impressive and emphatic still is the utterance of one of the most eloquent and able lawyers of the American Bar:

"I do not know," said Rufus Choate, "that I can point to one achievement in American statesmanship which can take rank for its consequences of good above that single decision of the Supreme Court which adjudged that an act of the Legislature contrary to the Constitution is void, and that the judicial department is clothed

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<sup>1</sup> *American Law Review*, 1865, p. 432, "John Marshall."

<sup>2</sup> *Kent's Comm.*, Vol. I, pp. 453, 454.

with the power to ascertain the repugnancy and pronounce the legal conclusion. That the framers of the Constitution intended this to be so is certain; but to have asserted it against Congress and the Executive, to have vindicated it by that easy yet adamant demonstration than which the reasonings of mathematics show nothing surer, to have inscribed this vast truth of conservatism upon the public mind, so that no demagogue not in the last stages of intoxication denies it—this is an achievement of statesmanship [of the judiciary] of which a thousand years may not exhaust or reveal all the good.”

It has sometimes been claimed that Marshall’s opinion on this point, as well as on the others, was *obiter*. In my judgment it admits of debate whether the decision is *obiter* on either of the two propositions first-above mentioned; but as respects the power and duty of the courts to declare a legislative act in conflict with the Constitution to be void, the record clearly presented the question for decision, and the judgment and opinion of the court thereon were in no respect extra-judicial. This may readily be shown. The Constitution denied to the Supreme Court the power to issue, as an exercise of *original* jurisdiction, writs of *mandamus*. The Judiciary Act, on the contrary, provided, in effect, that the Supreme Court might issue original writs of *mandamus* to persons holding office under the authority of the United States; that is to say, the act of Congress in this respect conflicted with the Constitution by attempting to confer a jurisdiction upon the Supreme Court which the Constitution had withheld. The court was, therefore, necessarily obliged to determine which controlled — if the Constitution controlled, and if it belonged to the court to declare an act of the Congress void, the writ must be denied; but, if the act of Congress

controlled, Marbury, having, as Marshall had shown, a legal right, was entitled to the writ.

I shall not, of course, undertake, nor is it necessary, to follow the reasoning of the Chief Justice sustaining the conclusion reached. Its essential ground was that in this country the Constitution is the supreme law; that by the Constitution the people limited the power of each department of government; that the Constitution fixes these limits, and in order that they may not be mistaken or forgotten the Constitution is cast in a written form. In any case properly brought before the judicial department it is the duty of that department to say what is the law that governs. If the terms of the Constitution and of the legislative act both apply to the case, and these conflict, the court necessarily has to decide whether it will follow the Constitution or the legislative act. The conclusion of the court was expressed in language which constitutes the foundation of American constitutional law, namely:

"It is essential to all written constitutions that a law repugnant to the Constitution is void, *and that the courts, as well as the other departments*, are bound by that instrument."

That is to say, the Federal Constitution is the supreme law, binding not only upon the people, but upon *every* department of the government, and the Supreme Court is its accredited and lawful expositor.

Two propositions were here affirmed, namely, that a statute in conflict with the Constitution was void, and also that it is within the power of the judiciary so to determine.

Bound up in the decision of this cause were the essential elements of all that is distinctive in American governmental institutions. It is the American theory that all power proceeds from the people; that ours is a govern-

ment, as Mr. Lincoln on a memorable occasion expressed it, "of the people, by the people, and for the people;" that in establishing governments the people limit every department of governmental power; that these limits are prescribed in the Constitution to the end that they shall not be overpassed or disregarded. In short, that it is a government of law, not only for the people subjected to its authority, but for the officers who, for the time being, are charged with the administration of its affairs. It was a novel conception and device when it was established, and practically it has remained unique to this day. Its successful working for more than a century has attracted the observation and praise of foreign statesmen and publicists. Thus, Dicey says:

"This American system which makes the judges the guardians of the Constitution, provides the only adequate safeguard which has hitherto been invented against unconstitutional legislation. . . . The glory of the founders of the United States is to have devised or adopted arrangements under which the Constitution became, in reality as well as in name, the supreme law of the land."<sup>1</sup>

In this America has given to the world the truest, it is not extravagant to say, the most sublime conception of law that has ever existed. Let me make this plain. In other countries law is regarded as something that proceeds from the State, considered as sovereign, and therefore is binding alone upon the subject. This conception is defective in that it fails to realize that law has not reached its full development until it attains a complete supremacy by binding alike the State and the citizen or subject. This great conception has only been made a

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<sup>1</sup> Dicey, *The Law of the Constitution*, 2d ed., London, 1886, Lecture iv, p. 145.

reality by the American device of written constitutions, which are the supreme law of the land, since their provisions are obligatory upon rulers and those subjected to their rule, and equally enforceable against both in all judicial controversies, and, therefore, *law* in the fullest and strictest sense of the term. All these conceptions which lie at the very foundation of our political institutions were decided in the case of *Marbury against Madison*, and are now an unquestioned part of the constitutional jurisprudence of this country.

This reference to the *Marbury* case would be historically incomplete without some notice of the manner in which the decision was received.

Marshall belonged to one political school, and Jefferson was the leader of the other. There were at that time reasonable grounds for the conflicting opinions. Marshall was penetrated by the sentiment and spirit of nationality, and believed that the Constitution, properly construed, conferred upon the Union all the essential powers of national sovereignty. Jefferson believed that powers in the central government in such amplitude as Marshall held them to exist were dangerous to the existence of the States and to the liberties of the people. He regarded Marshall's views with sincere alarm, and considered it a patriotic duty to resist and oppose them in every possible way. For this he should not be blamed, nor does it diminish our sentiments of respect and gratitude for his great public services. He will go down to posterity proudly holding in his hands the Declaration of Independence, and Marshall will go down holding in his the Federal Constitution. I am not unmindful of the strength of party names and traditions, and know how deeply the

memory of Jefferson is still revered by our countrymen, but I am incapable, I trust, at any time, and especially at this time, of saying a word that could give the least offense to anyone who hears me. I make these observations because I realize full well that "e'en in our ashes live their wonted fires," and in proceeding to state how Jefferson regarded the doctrines of Marbury's case, I wish it distinctly to appear that it is not done in any spirit of unfriendliness towards the memory of that distinguished man.

The fundamental article of Jefferson's creed was faith in the people, an assertion of their right to decide all matters pertaining to their welfare, and a firm conviction that their deliberate decision could be trusted; and the practical result of our national experience of more than one hundred years has justified Jefferson's faith in American popular government. As the champion of this principle Jefferson's triumph has been as great as the triumph of Marshall as the judicial expositor of the principle of nationality in the Federal Constitution.

During the trial of Burr for treason, Jefferson wrote to United States District Attorney Hay, June 2, 1807:

"I observe that the case of *Marbury v. Madison* has been cited in the Burr case, and I think it material to stop at the threshold the citing that case as authority, and to have it denied to be law. . . . I have long wished for a proper occasion to have the gratuitous opinion in *Marbury v. Madison* brought before the public and denounced as not law; and I think the present a fortunate one, because the case occupies such a place in the public attention. I should be glad, therefore, if, in noticing that case, you could take occasion to express the determination of the executive that the doctrines of that case were given



extra-judicially, and against law, and that their reverse will be the rule of action with the executive."<sup>1</sup>

Jefferson reiterated these views in his old age. In a letter to Justice Johnson, June 12, 1823, he criticises the *Marbury* case at length.

"No veto power, ancient or modern," said Jefferson on another occasion, "ever existed so formidable as this American irresponsible judicial veto — a power to dismiss laws as the President may dismiss officers under him."

In further illustration of the value and lasting influence of Marshall's constitutional judgments, I next refer to the case of *Dartmouth College*, 1819, perhaps the most celebrated of all the cases decided by him. Important it certainly is, but I do not consider it so vital to the Union as some other decisions of Marshall. In this assemblage of legislators, judges and lawyers it cannot be necessary to state at any length the college case, even if time permitted. It involved the construction of the clause of the Constitution which ordains: "No State shall make any law impairing the obligation of contracts."<sup>2</sup> The State of New Hampshire made material changes in the mode of government of this institution as established in its charter, changes which took away the control of the college from the charter trustees and subjected it to the control of officers, a majority of whom were to be appointed by the Executive of the State. The highest court of New Hampshire sustained this legislation. Marshall, with the concurrence of all of his associates but one, reversed the judgment of the State

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<sup>1</sup> Jefferson's Writings (Ford), Vol. IX, p. 53, note.

<sup>2</sup> Art. I, sec. 10.

court and held that the legislation of New Hampshire was in conflict with the clause of the Constitution which forbade the States from impairing the obligation of contracts.

No one ever questioned that this clause applied to private contracts, to all valid private *contracts between individuals*. The great, the peculiar question in the case was: Does it apply to any other class of contracts? Is a legislative charter when accepted and acted on by the grantee a contract between the State and the corporation as to the essential franchises and rights therein granted within the meaning of the clause of the Federal Constitution above mentioned? The Supreme Court held that a legislative charter was such a contract, and the consequence of course followed that the grant was irrevocable and could not be altered without the consent of the corporation, unless the power to do so was reserved, either generally or specially, when the charter was granted.

No case in the history of the court has excited more discussion or criticism than this one. The principle that there may be a legislative contract with a corporation that falls within the restraints imposed by the Federal Constitution upon the power of a State to impair or destroy has been often reaffirmed by the Supreme Court, has been generally acquiesced in by the State courts, and is a settled principle in our constitutional jurisprudence. Its application in the later judgments of the Supreme Court has been restricted so as to confine it to cases where there is a plain purpose on the part of the State founded upon a sufficient consideration to make an actual contract which the parties intend shall not be subject to future conflicting legislation on the part of the State.

I may, perhaps, venture to add that while in my judgment a legislative charter to a private corporation, so-called, as distinguished from a public or municipal corporation, may, within the meaning of the Constitution, be a "contract," still the precise point of decision in the Dartmouth College case, that the royal charter was such a contract, I cannot but regard as of questionable soundness, and it may be doubted, in the light of subsequent decisions, whether if it were presented *de novo* to the Supreme Court it would now be so held.

The beneficent effect of the decision in this case consists in the sanctity which it gave to *all* contracts by protecting them from hostile legislation. This principle has been uniformly applied by the Supreme Court, and innumerable acts of State legislation in conflict with it have been held void, and dishonor and repudiation prevented. The doctrine of the Dartmouth College case, as applied by the Supreme Court in its various decisions, is not only sound, but has been one of the chief causes of our individual and national prosperity.

In further illustration of the permanent value and effect of Marshall's constitutional decisions I shall next refer to what was at the time known as the Bank case (reported under the name of *McCulloch against Maryland*, decided in 1819). It presented questions underlying the very existence of the government of the Union. Its decision not only determined the conflicting claims of the General and the State Government on points of great moment, but also laid down the true principles of construction by which the respective limits of their powers are ascertained, and it is, moreover, among the most striking examples of the wisdom of the framers of the Constitution

in constituting the Supreme Court of the United States the tribunal to determine finally and peacefully competing pretensions of the States and the General Government. The case was, in fact, a controversy between the United States and the State of Maryland, and involved, on the one hand, the constitutionality of an act of Congress, and on the other, the constitutionality of a revenue statute of the State.

The War of 1812 was followed by a period of great financial distress, during which Congress rechartered, in 1816, the Bank of the United States as a fiscal agency of the government. The act was approved by President Madison. The Constitution contains no express power to charter a bank or to create any corporation, and under the principle of strict construction (that no power exists unless expressly granted), the act would be unconstitutional, and such was the contention of the State of Maryland. Branches of the principal bank were established in several States, among others, in 1817, in Maryland, and had power to issue notes to circulate as money. The Legislature of Maryland, the next year, enacted a statute taxing all banks or branches thereof located in that State not chartered by its legislature by requiring that notes issued by them should be upon stamped paper of the State. This legislation was aimed at the branch bank and was probably intended to tax it out of existence in the State of Maryland. The government claimed that this act, if applied to the branch bank in Maryland, was repugnant to the Constitution of the United States, and was, therefore, void. The branch bank having refused to pay the tax, an action was brought to recover the amount thereof against Mr. M'Culloch, its cashier; and this was the case which was finally presented for the

decision of the Supreme Court of the United States, to which it was carried from the judgment of the Supreme Court of Maryland in favor of the State and against the bank.

The momentous questions which lay at the foot of this controversy were fully appreciated at the time. The case attracted universal attention. Appreciating that the fundamental principles of the government were at stake, the opinion of the Chief Justice is one of the ablest and most elaborately reasoned which he ever pronounced. Concerning the bank, the court held that it had been chartered by Congress as an instrumentality to carry on the financial operations of the government, and that although the power to create a bank for such purpose was not expressly found in the Constitution, yet it was implied in the great powers to levy and collect taxes, to borrow money, to regulate commerce, to declare and conduct a war, and to raise and support armies; and that these powers being given, Congress had the right to select or create any appropriate means to facilitate the execution thereof.

The tests by which to determine the extent of the implied powers of the General Government as laid down in this opinion are not now questioned or denied. After this decision the question as to creating a national bank became one wholly of legislative policy. As we know, a bill for that purpose, passed by Congress in 1836, was vetoed by President Jackson partly on the ground that it was unconstitutional. This presented, of course, no question for judicial review. Many years afterwards, however (1863), the existing system of national banks was created by Congress, to the great benefit of the country, and at this day no one, I think, seriously doubts

the power of Congress to enact legislation of this character.

The other question in the case as to the power of the State to tax the bank is in its principles equally important. The claim of the State was more than plausible; it was one not a little difficult to answer. The State said, in effect: "We are sovereign. Taxation of all persons and property within our limits belongs to sovereignty; and there being no prohibition in the Federal Constitution against the exercise of this vital power on the part of the State, it remains in all its amplitude uncurtailed in the several States."

But Marshall held that this claim on the part of the State was fully answered by the principle already announced, namely, that the bank was rightfully established as a fiscal agency of the General Government, and that this excluded, by necessary implication, the right of the State to levy a tax against its operations without the consent of Congress, since unlimited power to tax involved the power to destroy. "If," said Marshall, "the States may tax one instrument employed by the General Government in the execution of its powers, they may tax any and every other instrument which would defeat the ends of the General Government. This was not intended by the American people. They did not design to make their government dependent on the States."

This principle has since been applied to many subjects other than taxation; and a long line of adjudications in the Supreme Court has resulted in the establishment of the general doctrine so essential to the maintenance of the government — that the States cannot in any manner control the General Government in its legislation or operations when acting within the sphere of its constitutional

powers, and that any interfering legislation on their part is unconstitutional and void. The States cannot lay the weight of their little finger upon the powers of the General Government. The views of the Chief Justice on both branches of this case are now everywhere accepted and unquestioned, and their general adoption is among the most splendid and useful triumphs of Marshall's genius. As a complementary doctrine it may be stated that the Supreme Court, in other cases, have decided that the United States cannot tax, control or interfere with the agencies or instrumentalities of the States.

As falling within the principle that the Federal courts have the power to protect all rights given by the Constitution and laws of the United States, I have only time to refer in the briefest way to the great case of Cohens against Virginia. Some time before this case was decided the Court of Appeals of Virginia, in 1813, declared that they were not bound by a judgment of the Supreme Court reversing a judgment of the highest court of Virginia, even although it involved a Federal question — a principle which would break up the Union. This question was again presented to the Supreme Court of the United States in the case of Cohens against Virginia, complicated by the further fact that the State of Virginia was a party to the record. This came before the Supreme Court in the exercise of its appellate jurisdiction, and Chief Justice Marshall, in the great judgment which he delivered in that case, in 1821, decided that the Supreme Court of the United States had rightful jurisdiction over the judgments of the State tribunals whenever those judgments, in the opinion of the Supreme Court of the United States, denied to any person any right which the Constitution and laws

of the United States conferred, and this even though a State was a party to the record. That doctrine, absolutely vital to the supremacy of the Constitution and laws of the United States, has never since been disputed and is daily acted on in the Supreme Court of the United States. Mr. Jefferson severely criticised this opinion.<sup>1</sup>

As a striking example of the extensive and beneficent influence and operation of Marshall's constitutional decisions, I select what is known as the New York Steamboat Case (reported under the name of *Gibbons v. Ogden*<sup>2</sup>). This was decided in 1824. It is the first case that construed, in any important particular, the commerce clause of the Constitution. It is a well-known historical fact that the most efficient cause of the formation of the Union which resulted from the Constitution of the United States was the selfish and conflicting regulations of the different States in respect of commerce, each trying to secure an advantage over the others, there being no power under the Articles of Confederation to regulate or control this great and essential subject. This experience led to a provision in the Constitution<sup>3</sup> in these words: "The Congress shall have power . . . to regulate commerce with foreign nations and among the several States." This truly vital power, as respects foreign and domestic commerce, is contained in eleven words — "to regulate commerce with foreign nations and among the several States." There is no attempt to define what is "commerce," or what is meant by "regulation." The case involved the respective powers of Congress and the States over commerce.

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<sup>1</sup> Jefferson's Writings (Ford), Vol. X, pp. 239, 232.

<sup>2</sup>9 Wheaton's Reports, 1.

<sup>3</sup> Article I, sec. 8, par. 3.



The circumstances out of which that case arose and under which the decision of Marshall was made are extremely interesting. There were enacted by the State of New York five different statutes between the years 1798 and 1811, granting or confirming to Livingston and Fulton, or one of them, the exclusive right of using steam-boats upon all the navigable rivers, bays and waters within the limits and jurisdiction of the State of New York for a specified term of years. One provision was that for each additional boat which could be propelled by steam with or against the current of the Hudson river, at not less than four miles an hour, they should be entitled to five years' extension to their grant, not to exceed thirty years. If good for thirty years the State could, of course, renew or extend it indefinitely. For the specified period the State granted a monopoly, under pain of forfeiture of boats and vessels owned by others, which should violate the exclusive right granted to Livingston and Fulton. These acts recited that the inducement to the grant was to encourage the grantee to engage in the uncertainty and hazard of making expensive experiments in improving steam navigation.

In 1812 the highest court of New York (in *Livingston v. Van Ingen*<sup>1</sup>) sustained the validity of this grant, holding that it was not repugnant to the commerce clause of the Constitution of the United States, or it was, at all events, good until Congress should enact a statute which would conflict with the right granted by the State of New York.

The grounds and reasons in favor of sustaining the legislation of the State were stated by Chancellor Kent with great force. Accordingly, the defendants were ab-

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<sup>1</sup> 9 Johnson's Reports, 507, 572, 578 (1812).

solutely enjoined, in favor of Livingston and Fulton, from navigating the Hudson with their steamboat, the "Hope," and carrying passengers on that river from New York to Albany.

Under these grants and under the decision of the highest court of New York, already mentioned, made in 1812, a large amount of money had been invested in the construction of steamboats. Afterwards, 1818, in this condition of affairs, the case of Gibbons against Ogden was brought in the Court of Chancery in New York.<sup>1</sup>

Chancellor Kent enjoined the defendant, Ogden, from running his two steamboats between Elizabethtown, in New Jersey, and the City of New York, holding that the question had, after an elaborate and profound discussion, been decided in the previous case of *Livingston v. Van Ingen*. At the January term, 1820, the highest court of the State unanimously affirmed Chancellor Kent's order, holding the exclusive monopoly in the grants made by the Legislature of New York to be valid, and that its Court of Chancery had the power to restrain citizens of another State from navigating the waters of New York with vessels propelled by steam, although such vessels may have been duly enrolled and licensed under the laws of the United States as coasting vessels.

It was this last case that came by due process of law before the Supreme Court of the United States. The cause was argued by counsel of the greatest eminence; Wirt and Webster against the constitutionality of the New York legislation; Emmet and Oakley in favor of it. That court reversed the decree of the New York courts and held that the power of the General Government to regulate commerce extends to navigation in the waters

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<sup>1</sup> See 17 Johnson's Reports, 488 (1820).

throughout the entire Union and does not stop at the external boundary of a State, and that the grants to Livingston and Fulton of an exclusive right to navigate all waters within the jurisdiction of the State of New York, by steamboats, was inoperative as against the laws of the United States regulating the coasting trade, and could not restrain vessels licensed under these laws from navigating waters within the jurisdiction of a State in the prosecution of such trade.

The opinion of the court was delivered by Chief Justice Marshall. He defined, for the first time, the meaning of the word "commerce," as used in the Constitution. He said it includes navigation. It includes trade and commerce. But he went further and said that *it is intercourse itself*. He defined also the word "regulate" in a definition which it has been justly said can never be excelled in its brevity, accuracy and comprehensiveness. To "regulate" commerce, said Marshall, is to prescribe the rule by which commerce is to be governed; and he, furthermore, asserted the proposition, so extensive and beneficent in its future operation, that "wherever commerce among the States goes, the judicial power of the United States goes to protect it from invasion by State legislatures."

The same sound and liberal principle was applied by the Chief Justice as against the right of the States to tax foreign commerce, in the case of Brown against Maryland.

We owe it to Marshall and the eminent judges who sat in the court with him that our vast foreign commerce is unfettered, and that our interstate commerce, still vaster, on land and water, by boat, or rail, or telegraph, knows

no State lines, is subject to no State exactions, and is as free to everyone engaged in it as the elements of air and water.

The Constitution provided for freedom of commerce between the States by prohibiting one State from levying any duties upon goods brought from another State. This was the initiation of a policy new in the history of the world, but this provision by itself would not be adequate to secure the end sought, viz., the absolutely free interchange of traffic — and it was, therefore, accompanied with the provision, not found in the Articles of Confederation, vesting in Congress the power of commercial regulation, both as to external and internal commerce. This wise policy would have been brought to naught if the constitutional question in the New York Steamboat Case had been decided the other way by the Supreme Court of the United States.

The importance of the decision, and of the principles and grounds on which Marshall's judgment rested it, grow upon us year by year, commensurately with our ever-increasing domestic commerce. But the value of that decision is not to be estimated from a commercial standpoint. Its momentousness consisted in the fact that it involved in its consequences the existence of the Union. New Jersey and Connecticut had already passed retaliatory laws. The Union could not have long survived if the New York legislation had been sustained by the Supreme Court of the United States.

Marshall's wisdom and foresight so expounded the commerce clause that it embraced within it the railway, the telegraph and the telephone, as they successively came into existence. And now every vessel, however propelled, every car and every electric message destined to another

State has a national character, and absolute immunity from State control or interference. Marshall's judgments, our great waterways and our transcontinental lines of railway and telegraph, free for all commercial and social intercourse, without regard for State boundaries, have done more than any other visible agencies to bind together into one united nation the forty-five States which compose it. I said visible agencies. The still stronger agencies are invisible—I mean race, blood, genius for government, love of freedom, the common law, the heritage of liberties which go back to Hampden and Magna Charta, pride in the Union, and universal respect and reverence for law.

Time does not permit further reference to single cases. Those which have passed under this rapid review illustrate the more important of the great powers and limitations of the Constitution. This survey suggests a few general observations.

The field of constitutional law at the commencement of Marshall's judicial career was, as we have seen, almost uncultivated. It was not even explored. Marshall found the Constitution an open text. Its grants of power to the central government and its restraints upon the States were couched in the fewest and most general words. It wisely defined nothing. As it came fresh from the hands of the Federal Convention, which Jefferson called "an assembly of demi-gods," it reminds one of what a celebrated critic said of Bayle's Dictionary: "When you open it, what do you expect to find? Nothing. What may you find? Everything." Whether this new instrument meant everything or nothing, it became the solemn, and, when we consider the stupendous issues at stake, the awful duty of Marshall and his associates to determine.

Was the new government merely another confederation, and the Constitution simply the mechanical bond by which the States were for certain enumerated purposes, and for such only, loosely articulated? Or was it a new nation, instinct with life and clothed with all the powers and attributes of sovereignty which were necessary for its growth, development, preservation, protection and defense against all hostile comers, foreign and domestic?

Each one of the cases which I have brought under review to-day, and others, so vitally affecting the Constitution and the Union, could have been decided the other way. Many lawyers and statesmen firmly believed, and earnestly maintained at the time, that they ought to have been decided the other way. On all these subjects Marshall's views have been finally accepted by the country as necessary to the integrity and welfare of the Union, and are no longer disputed or challenged.

This result is, in no small measure, due to the character of Marshall's judicial opinions. They have qualities distinctively their own. They are among the most massive and original productions of the human intellect. Any one familiar with them instantly knows Marshall's style. It has been said that it was hard and dry and lacked finish. To this I cannot agree. Unornamented, indeed, his opinions are, and in all of his writings I recall only a single metaphor. But for strong, vigorous, masculine English, which expresses his meaning with the utmost clearness, precision and force, I do not know where his judicial style is excelled. His opinions are characterized still more distinctively by their matter than by their form. Though relating in many cases to

questions on which parties warmly differed, how utterly free they are from political bias!

Story said: "When I examine a case I go from headland to headland, from case to case; Marshall has a compass, puts out to sea, and goes directly to his result." This is true. Marshall drew upon his own intellectual resources, and his drafts were always honored. In the light of his own intelligence, like another Columbus, he sailed, with dauntless courage, into new and unknown regions, guided only by the great principles of right, reason and justice, which he applied with equal caution, courage and wisdom in the practical work of construing the Constitution. His opinions are masterful examples of pure reasoning, and logic, and legal intuition. It has often seemed to me that he was endued, in a wonderful measure, with what the old theologians called "illuminating grace," enabling him to see the end from the beginning, and the bearing and effect of any principle or proposition, however artful or insidious, with a far-reaching sagacity that was never surpassed. His power of exposition in his opinions irresistibly carried conviction and compelled assent.

He had other first-rate judicial qualities. He courted, he demanded, argument. He had the aid of the ablest lawyers in what Mr. Phelps, himself a great lawyer, calls the Augustan age of the American Bar. He had, in a degree often remarked, a patience which, as Mr. Binney expressed it, was only exhausted when patience ceased to be a virtue. Marshall had, moreover, another quality without which no man can be a great judge — courage. Marshall's placid courage, exhibited on many signal occasions, knew no fear, except the fear of God and the fear that through some unconscious lapse he might fall

into error. Consequences of his decisions to himself or to parties, if he ever considered, he never heeded. Back of all this was the simplicity, worth and dignity of his lofty character.

During Marshall's term the outlines of the Constitution were fixed, every one of its more important powers and prohibitions was expounded, so that, as Mr. Justice Bradley observed: "It may truly be said that the Constitution received its permanent and final form from the judgments rendered by the Supreme Court during the period in which Marshall was at its head. With a few modifications, superinduced by the somewhat differing views on two or three points of his great successor, and aside from the new questions growing out of the Civil War and the recent constitutional amendments, the decisions made since Marshall's time have been little more than the applications of principles established by him and his venerated associates."<sup>1</sup>

When Marshall went upon the bench, the new Government itself and the Constitution as the only bond of union were in the experimental stage of their existence. When he left it both were firmly established. Marshall's great service to the country — a service of an original and creative character, and one which the course and experience of his life and his wonderful intellectual qualities fitted him above all other men of his time to render — was that his celebrated judgments expounding the Constitution supported it and carried it safely through the feebleness and perils of its infancy and placed it securely upon the foundations on which it has ever since rested and now rests. We know to-day what we have.

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<sup>1</sup> Mr. Justice Bradley, *Century Magazine*, December, 1889.



We realize that we live under a Constitution which pours upon the people of this country every day and in every State the continual dew of its blessings. The nation was weak and lowly enough when Marshall's Chief Magistracy began. But we view it to-day in its lofty estate, when it has put on "the grandeur of its history," and such a history! All the strength and joy, patriotic pride and love of the Union, which come from a hundred years of great achievements, with all their clustering associations, with all their cherished traditions, with all our boundless and swelling hopes for the future—all this is ours, and its conscious possession inspires and underlies these public honors to the name and memory of Marshall. We feel almost sure that a narrow, rigid, iron-clad, jealous construction of the Constitution would have changed our whole history and perhaps have led to a shipwreck of the Union. No military chain binds us together. The bond, and only bond, of Union is the Constitution. Instead of two or a dozen rival, jealous, clashing or hostile republics, some north, some south, some east, some west, we have one united nation, held together in the peaceful embrace of the Constitution.

Under Marshall's views it has been possible for our stupendous national growth and development, both in his time and ever since, to take place in accordance with the natural process of evolution without any strain upon the Constitution and without danger to the national existence. His judgments and the principles on which they rest, as he expounded them, are fixed lights for the guidance of people, legislators and courts. They are as necessary to-day as they were when they were pronounced. They are almost as important as the texts of the Constitution which they construed, and to which they gave precision and authoritative force.

We know to-day that there is no real danger to the Union from the center, from the President, or Congress, or the Federal Judiciary, or all combined. Such dangers have proved to be imaginary. These spectres which so alarmed our fathers haunt not their children. I should not be true to the duty of the occasion if I did not add that in my judgment the plain lesson taught by our whole past history is that whatever danger exists, if any, is to be found, not in the central power, but in the States. In the past, coming down even to the present, States have passed many laws of a character that would have broken up the Union had it not been for the limitations on their powers which they disregarded, and which have only been made effectual by the judicial enforcement of Marshall's principles of Nationality. These principles, however, guard with equal vigilance and fidelity, as of equal importance, the rights of the States as well as those of the General Government. In the future, as in the past, our reliance must be upon the good judgment and affections of the people for the Constitution and the Union; but so far as judicial action or remedy goes, it must chiefly be upon the maintenance, in the spirit and with the wisdom of Marshall, of the Contract-Clause, the Commerce-Clause, and Magna-Charta-Clauses of the Fourteenth Amendment, the combined effect of which is to place under ultimate national protection the great primordial rights of life, liberty, property, freedom of commerce, sanctity of contracts, and equality before the law.

The framers of the Constitution, "their faith triumphant o'er their fears," inscribed over its stately and massive portal that it was, among other things, ordained and established to "secure the blessings of liberty to our-

selves and to our posterity." The Constitution was thus intended to be perpetual. Marshall's labors are wrought into its very fabric, and while the Constitution remains Marshall's fame is secure. It will grow with the growth, strengthen with the strength, and brighten with the increasing glories of the Nation. We hope and believe that the Union of these States, bounded by two inviolable oceans, will continue through uncounted years to diffuse its blessings and benefits upon us and our posterity. We cannot forecast the future. God's Providence determines the destiny of nations, and its workings are often as inscrutable as they are irresistible. It may be that the principles of American constitutional liberty shall become the right and birthright of distant peoples whose lands are washed by other seas and whose eyes look up to other stars. Certain it is that wherever our Constitution is or shall go, or wherever constitutional liberty shall exist on earth, there will attend it, and abide with it, the spotless and honored name of JOHN MARSHALL.

At the conclusion of the foregoing address, former Chief Judge Charles Andrews offered the following resolution, which was passed:

Mr. Chairman, I beg leave to offer a resolution of thanks for the very eloquent and noble tribute by the speaker to Chief Justice Marshall, and to request that a copy of the address be furnished to the Bar Associations for publication.

**EXERCISES AT CORNELL UNIVERSITY.**

The day was appropriately celebrated at Cornell University, Ithaca. The President of the University, John G. Schurman, presided, and the principal address was delivered by ex-Judge Francis M. Finch. The faculties and students and members of the bar and a large attendance of citizens were present. President Schurman introduced the orator of the day with the following observation:

President John Adams once said that the gift of John Marshall to the people of the United States was the proudest act of his life, and if ex-Governor Cornell were here to-day he would undoubtedly say that his greatest gift to the people of New York State was the appointment of Francis Miles Finch as a judge of the Court of Appeals, now the honored Dean of the College of Law in our University.

**Address by Francis M. Finch.<sup>1</sup>**

One hundred years ago this winter day a new Chief Justice took his seat upon the Bench of the Federal Court at Washington. The court-room of the time was little better than a cavern, situated in a basement dark and dreary at the best, without ornament or touch of grace or dignity. The new occupant of the Bench took his seat quietly, careless of formality or display, and at once addressed himself to the work before him. The few who looked on at this simple but grave assumption

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<sup>1</sup>This address is published in *Yale Law Journal* for March, 1901, Vol. X, No. 5, p. 171 *et seq.*

of duty saw nothing remarkable in the man himself, sitting there wrapped in the dusk of his gown. The head was not large; no massive dome of brow overhanging the eyes; small, rather, as crown of a tall and powerful form, and yet a form so emaciated and with muscles so relaxed as to make each movement somewhat awkward. Only in the brightness of the intensely black eyes, piercing and scintillant, shone a trace of the dominant and powerful soul, waiting in the dark background to make all men know and heed. Scarcely at all impressed were some of those who looked on, but others who knew the man and the life he had lived lifted a warning finger that said wait and you will see. For they remembered that he came to his new duties with an experience rich and full, with a preparation thorough and arduous, and with a brain of strongest and finest fiber. He had fought through many battles of the Revolution, displaying his young courage under the eye of that great chief who led his rustic riflemen against the veterans of an empire, and learning from him an indomitable patience, which has no better type than the familiar one of the obstructed river grinding its slow way through the rock. A lieutenant at nineteen, a captain at twenty-one, and often serving as Judge-Advocate where the Courts-Martial sat with their swords on the table, he shared in the unsuccessful defense of the fords of the Brandywine, in the desperate attack at Germantown—beginning with victory but ending with a rout,—and then in the cold and famine of Valley Forge—camp of bloody feet on the snows, camp of starvation for those who did not freeze, camp where treason and grumbling and envious ambition strove hard to overthrow the sad but determined leader of them all. Surely the young captain learned many

lessons from the war. One learns fast in a fight, and lessons are plentiful, if hard, where hope wrestles with suffering and courage baffles despair.

But before the war closed, and when it had for the moment drifted away from need of him, he began the study of law in the office of one soon to be chancellor, and already a little gray with the cobwebs of equity, but a study broken more or less by occasional military service, and so mixing law and war — books and drums — until peace was declared and law became the dominant pursuit. Not always dominant, for that happened to him which so often happens, that from the beach where law borders on politics and the sands touch the water, he was lifted by an incoming surge and swept into the troubled waves of party warfare:— scene where another fight was on between We the People and We the States — a fight to demand of him the matured strength and vigor of his life.

He was elected to a seat in the Virginia Legislature. They chose men in those days, the best there were and with wills of their own, and the young man beginning his political career faced adversaries whose thrust and blow were the keenest and heaviest within the Virginian borders. More lessons and of a different sort were here learned, and one gravest of all, pushing up from the tangle of conflicting aims and snarling rivalries, that the existing Confederation of the States was but a rotten girdle which the weakest whim could break, and that some way and somehow a bond must be forged, iron-linked and steel-riveted, to concentrate and compact the restless and defiant sovereignties into one solid and controlling organism. Difficult lesson! but already the bond was being prepared. Difficult! for men like not to be

governed and prefer to govern, and freedom is a word easy to misuse and a tempting lure for unreasoning crowds not able to measure its meaning. And so when a written constitution was framed about every word of which some struggle had swirled and combatants had gathered; framed so as to tie the separate States into regular orbits about a sun of national control and stop their erratic and centrifugal flights into the boundless space of unchecked liberty, there was war at once, war of words and of argument, war of sarcasm and invective, war everywhere of such giants as there were.

Our young lawyer and legislator was drawn into this conflict by virtue of his place as a member of the Virginia convention to which the proposed Constitution was submitted for ratification. No doubt about his vote at least, but terrible doubt as to the final outcome. For a determined opposition to the new restraint and the untried system was led by Patrick Henry, that splendid orator whose brilliant eloquence blazed all through the war, and has become only a marvelous legend in these days when words are very sober things and commonplace, and few dare to give them wings that they may sometimes fly and not eternally crawl. But the eloquence of Henry by no means stood alone. It was backed and buttressed by the cooler arguments of Monroe and Mason and other champions of State sovereignty who rang the changes on what they were pleased to regard as the utter destruction of human rights. It needed strong men to confront these formidable adversaries especially since the Constitution was not popular among the people. It needed as it had the learning and ability of Madison, the earnest appeals of Randolph, the legal adroitness of Wythe, and more than all the lucid and resistless logic of

Marshall, whose name at last was on all men's tongues. It is not too much to assert that he bore a leading part against the assault in a debate lasting twenty-five days, and that the narrow majority by which Virginia accepted the Constitution was largely due to his powerful advocacy. He was no orator, he had no graces of rhetoric, the tones of his voice were neither mellow nor persuasive, no subtle magnetism flashed along the lines of his thought, but he was compelled to win, if win he did, by the sheer force of unanswerable argument, running crystal-clear, rising grandly over all obstructions, and floating truth to its harbor.

See again what lessons he was learning, all unconscious of their bearing on his future life and fame. Before such antagonists, certain to detect mistake or riddle fallacy, it was imperative that he should know the Constitution thoroughly in every word and line, that he should have precise views of its construction and of its scope and range of its operation, and this required prolonged study and patient and honest thought. How well he did the work all authorities agree. Even Henry praised his "candor" and awarded him "veneration and respect," and Wirt tells us the secret of his wonderful power. He saw always, at once and as if by intuition, the pivotal point of every controversy on which the conclusion was sure to swing, and, disdaining all artifice and discarding all incident or accident surroundings, moved straight upon it and enveloped it with a merciless logic. Every link in the chain of his reasoning was sound and clean, developed with a marvelous simplicity as clear as it was strong. There was no escape from the deadly sequence of his thought, and his masterful capacity lay in his power to compel conviction, to force surrender.



But not yet was his preparation complete. It seemed almost as if some Providence was training him like an athlete for a struggle vital to a free civilization. For he passed a term in Congress mingling with statesmen and partisans and studying the ways of each; then went to France on a diplomatic mission and returned disgusted with a race which vilified everything American, and not for the last time either, as we were taught during our war with Spain, and should not pardon quite so cheaply as we do; next was made Secretary of War and then Secretary of State, where the methods of diplomacy and the doctrines of international law became familiar to his thought; and finally and at last, the preparation ended, Chief Justice of the Supreme Court, and the man whom we saw quietly taking his seat on the Bench.

Let him sit there silent for a moment while we consider, as perhaps he was doing, the trouble behind him and the danger in his front, for both threatened the success of his judicial career. The court itself was in its infancy, but twelve years old, just learning to walk alone. It had done little in that period, gained nothing in the popular estimation and not overmuch in its own. Its members had been constantly changing, and refusal to serve was a common answer to judicial appointment. Even the great ability of John Jay and the respect which he inspired could not lift the dead weight of a position so humiliated that the judges had been required to act as commissioners of pensions and to dole out the nation's charities. Jay, himself, on his resignation, spoke discouragingly of the tribunal and ventured to doubt whether defects in its organization would not inevitably impede its usefulness. Doubtless this was the prevailing impression though hardly a just one, for, in its brief life, it laid

down some foundation principles of great value and which no successor was required to overrule or disregard. But after all, these did not suffice to lift it to its true and destined place as one of the co-ordinate departments of the government, or to secure for it the reputation and authority which was its due. Nobody feared it. Many gave it disrespect. That was the trouble which Marshall saw behind him; a court to be lifted from a low level into higher and serener air; a court despised to be made a court respected; a tribunal of little power to be transformed into an invincible guardian of national justice and peace.

The trouble in front of him was of a different sort. Great judge as he was, let us not forget that he was human. Let us not try to make of him a bronze statue, swarthy and stern, for there were sensitive vibrations in his nerves and warm blood in his veins. He could love with an absorbing passion, and those who do that can at least dislike a little and on occasion. The man who for twenty years and in spite of his public toils could wrap about the invalid wife of his youth a most devoted affection and tender care was likely to be a man who would feel what he regarded as false or wrong down to the bone. And he surely foresaw that his patience and his temper as well as his intellect were to be subjected to a severe and continued strain. For he had not seen the rapid growth of party strife, so poisoned with venomous lies on both sides that the simple truth remains yet obscure, without recognizing that the head and front of the clamor for State rights and for a strict construction of the Constitution, so narrow as to throttle the infant in its cradle, was Thomas Jefferson, popular idol and leader, who had rendered service great and brave in behalf of independence,

and now, about to take his seat in the Presidential chair, would be likely to wield the whole executive force against a centralized national power; no man suspecting how much the sobering pressure of official responsibility would make his action better than his words and his doctrine disappear in his deeds.

These two men did not like each other. They could not. They were made on different patterns. If for a time they treated each other with some politeness it was as thin and cold as the baby ice of a first freeze. A collision was sure to come. And so, in front of the new occupant of the Bench, loomed up a dangerous and difficult struggle against an adversary astute and crafty, entrenched in the very fortress of power, and at the head of a party strong in the victory it had won. The Chief Justice had not only that hostility to face, but also to stand on guard over his own fairness and impartiality, and to banish from his judgment every trace of such unconscious prejudice as might warp his thought with personal distrust or partisan desire; for the smoke of the battle hung yet about him and there were live coals in the ashes, but never again to be blown into a flame. In my study of the man I have been most strongly impressed with the swift and thorough way in which he put off the fighting partisan and put on the calm and thoughtful and rigidly impartial judge.

The inevitable collision came, and over as little a matter as the appointment of a justice of the peace in the District of Columbia. President Adams, in the waning moon of his term and just before it ended, lent himself to a seizure of vanishing spoils by filling all possible offices with his own partisans and so leaving to the victorious enemy only the shouting but no booty. In a changed

form the charming game has been played in our own day. Among these death-bed appointees was one man whose commission as justice of the peace for the District had been made out and signed by the President after the nomination had been confirmed by the Senate, but not delivered to the anxious officer because it fell into the hands of Madison, the new Secretary of State, who, by his chief's orders, refused to deliver it, and so blasted the hopes of the waiting appointee.

We may not blame Jefferson. What he could snatch from the last blaze of the Federal fire he had some reason to think was his. But the embryo official, after demanding delivery of his commission and getting a curt refusal, applied to the Supreme Court for a writ of *mandamus* to be directed to Madison commanding him to deliver the commission to the appointee. Jefferson was enraged. Naturally. What business had a court to question the orders of the President or summon his Secretary to answer at its Bar? And so the Secretary refused to answer, or even to appear in the proceeding, and the Attorney-General answered only as a witness and upon compulsion. It was long before the decision came, for, beyond this studied contempt of a constitutional tribunal, there was a deliberate and venomous attack upon the independence of the Judiciary, which began with an Act of Congress abolishing the August term of the court, so that it was more than a year before the case was finally determined. But the time came at last and Marshall delivered the first of those opinions upon constitutional questions which have made his name famous and lifted the court to its true place in the republican system.

And this is how he did it. I may tell it, I think, so that no legal study or training will be needed for its compre-

hension; and I *must* tell it for a very grave reason which will develop itself in the process.

He began by stating the questions which the application raised in their natural and logical order. First: has the applicant a right to the commission which he demands? Second: if he has and the right has been violated, does the law afford him a remedy? Third: if it does, is that remedy a writ of *mandamus* by the Supreme Court? He discusses these questions in the order of their statement. As to the first he holds that the appointment was complete when, after confirmation of the nomination by the Senate, the President had signed the commission, and the Secretary of State had affixed the Great Seal, but that the recording the document and delivering it to the appointee were purely ministerial acts following the appointment, and not essential parts or elements of it, and therefore the applicant *was* duly appointed and so entitled to have his commission. To the second question the Chief Justice answered that the right of the officer so duly appointed to his commission and his office was a valuable and vested right, which had been violated by a withholding of the commission, and for such violation the law gave a remedy by an action for damages, and where that could afford no adequate redress, then by a writ of *mandamus*, commanding performance of the duty refused. So far the applicant was successful, but when it came to the third question, now become vital and decisive and shown to be such, the judge ruled that while an Act of Congress *had* authorized the court, in a class of cases to which the one at bar belonged, to issue a writ of *mandamus*, yet that authority was ineffective because the Act in that respect was in violation of the Constitution and so was null and void; and since no such authority had been granted

from any other source, the court had no right to issue the writ and the petition for it should therefore be denied.

I spare you a detail of the argument, but call your attention to two of the vastly important doctrines thus established, and to a criticism of the opinion which has more or less prevailed, but which I think to be without adequate foundation. The decision adjudged that Congress was not like the English Parliament, unlimited in its action and omnipotent in legislation, but was restrained by the limitations of the Constitution, the written evidence of the people's will; and that there was a tribunal, created by the same masterful will, which could enforce the restraint by annulling and refusing to act upon the illegal legislation. There was a two-fold value to this doctrine. It not only confined the National Legislature within the prescribed limits, but it provided also a peaceable solution of the inquiry, certain to continually arise, whether a specified enactment was or was not in accord with the Constitution; dispute likely to be rancorous and terminate in force if no other method of decision was provided. The opinion further established that no officer of the government was shielded from legal accountability by his official character if he trampled upon the vested rights of the most humble citizen.

It was not strange that the new President and his followers looked askance at the looming up of this judicial supervision, and sought to break its force by the criticism that so much of the opinion as passed on the validity of the petitioner's appointment was extra-judicial, unnecessary to the decision, and so without authority, and introduced to vent some Federal spleen on the President, and drive him to surrender of the offices which he withheld; because, said the assailants, if the court had no jurisdic-

tion, as it declared it had none, to issue the writ of *mandamus* at all, what mattered it whether the applicant was duly appointed or not, and what possible concern had the judge with that inquiry. The suggestion never in the least touched or weakened the magnificent force of the constitutional argument, but has cast a blur upon the legal excellence and accuracy of the opinion which has disturbed even devoted admirers of its author, and led sometimes almost to apology.

In the centennial history of the court, published with its approval, the opinion is said to be "in some respects *obiter dictum*," and the same thing is apparently conceded by the court itself as late as 1880 in the case of *United States v. Schurz* (102 U. S. 395), though it is added that the ruling, although said to be extra-judicial, has been steadily followed. I do not admit the soundness of the criticism. I have no apologies to make, but insist that none are needed. I maintain the judicial correctness and propriety of the whole opinion and deny that there is a single word in it which is extra-judicial or unnecessary to the ultimate decision. Be patient with me, I pray you, while I venture to remove even the faintest film of suspicion from one of the ablest and fairest opinions ever traced by a judicial pen.

I admit that ordinarily where the jurisdiction of the court to grant the relief sought is challenged that becomes the first question to be determined, and if the court is of the opinion that such jurisdiction does not exist the case is ended and comment upon the possible rights of the parties is immaterial, impertinent, and binds nobody. But that rule on occasion comes in collision with another rule to which it is necessarily subordinate; a rule of great value and of extremest wisdom, never to be consciously

violated. That rule is that an Act of the Legislature should never be declared unconstitutional and therefore void except where such declaration is absolutely and inevitably necessary to a determination of the case before the court: that is to say, that if the controversy *can* be determined on other grounds it *must* be determined on other grounds, and the constitutional question be left to some proper, because imperative, occasion.

The power to vindicate the Constitution against legislation which contravenes it is the highest and most delicate power of the judiciary. By the early court it was spoken of with reverence as an "awful" power. It is no common thing, no cheap resource to be drawn on at will. It challenges the action of the people's representatives, of a co-ordinate department of the Government; it throttles a law by them enacted; it measures the Act by the fundamental law. Indeed such a tremendous power should never be exerted without a necessity so imperative that from it there is no escape.

To that rule, which Marshall himself afterward formulated, he gave a just obedience as it was his duty to do. That duty demanded that before raising the constitutional question he should first determine whether, to solve the case before him, it was *necessary* to raise it; whether it might not be that the writ could be refused without touching the grave question of constitutional jurisdiction at all; in which event that question must be left, for the time at least, unsolved. To perform that duty the judge was compelled first to ascertain whether on the facts the applicant was entitled to the issue of a *mandamus*. Only if he was did the further question arise whether the court had power to issue it. For the inquiry was not whether there was general jurisdiction over the subject-matter of



the applicant's right to his commission, nobody disputing that, but whether there existed the special jurisdiction to award a particular form of remedy, and so, if the applicant was not entitled to that remedy, whether the court could give it or not, that would be the sufficient and proper answer. To add another, obviously needless, and yet involving a grave constitutional question, would be extrajudicial and rob the decision on that point of all authority. "*Obiter dictum!*" Jefferson would have shouted — a Federal harangue tacked to an ended opinion!

I may possibly, at the expense of some endurable repetition, put the justification of the opinion as a whole in another form. There were three methods of framing it and only three. First: the judge might hold that the appointment was not complete until the commission was delivered and so the applicant had no right to a *mandamus*. That would end the case and the opinion, for since the writ was refused for *one* sufficient reason it was not permissible to give another involving the constitutionality of a statute. Second: he might pass over the question of the applicant's right in silence and go to the constitutional question. But in that event those who believed the applicant had no right could dispute the necessity of the constitutional argument and therefore deny its authority; saying that the judge silently assumed what was false to justify his resort to the constitutional question, and did not dare either to assert or argue the proposition assumed. Or, third: he could do as he did, first establish the applicant's right, and then, the necessity of deciding the constitutional question being shown, proceed finally to the argument of that.

And so I am confident that there is not and never has been any real foundation for the criticisms of enemies or

the half-doubt of friends; that the opinion is not marred by the presence of a single needless or extra-judicial word; that from the beginning to the end it moves on its way with a logic as faultless as it is irresistible, and with a simplicity that is massive and grand; a carving cut from flawless marble by a master hand.

We may take this case as a type and example and spare ourselves any discussion of those others which slowly but surely built up that solid edifice of constitutional law which has proved to be the fortress and the glory of our republican institutions. For thirty-four years he continued his judicial labors, handing down from the Bench about five hundred opinions. They were models of judicial style. I often wondered how it happened that his severe reasoning and close and inexorable logic was clothed in words not only simple, but always apt to convey the thought, and flowing along with a movement as smooth and grand as that of a deep river unvexed by rocks or rapids. Perhaps Judge Story has given us the explanation. He credits Marshall with much of literary taste, describing him as a persistent reader of the famous English authors and as specially fond of poetry, and even tempted into writing verses of his own.

The fact tends to lessen our wonder at the lucid smoothness of his style, the even balance of his sentences, and now and then the dainty choice of an adjective. In one instance, at least, a flash of irony lit up the sober flow of his argument with an interjected phrase delicate indeed but having a cutting edge. And yet no grace or elegance of style was ever chosen for itself alone, but always as the fit vestment of close and logical thought. In that direction his opinions were remarkable for many things and in many ways.

tion's flag; they should shame the lips, few and scattered, spitting venom at the manliness of those who bear it; they should shame the mere demagogue, though nothing can shame him; and they should serve as the warrant for that vigorous national growth which is both natural and necessary; for when a nation ceases to grow that nation begins to die.

Silent for more than sixty years! alas, yes! For death came to the great Chief Justice as it comes to all; found him with the harness on, struggling against weakness to drag his accustomed load; left him asleep under the Virginian sod, every blade of which he loved with a Virginian's love for his native soil; left him with a simple and modest stone carved with the simple and modest words dictated by himself to mark his resting place. We may say of it, as Goldwin Smith has beautifully said of the plain tomb of the first Edward: "Pass it not by for its simplicity: there is no nobler dust."

#### EXERCISES AT BUFFALO.

The day was celebrated by the Erie County Bar Association at a dinner given by the Association. The President of the Association, Adelbert Moat, in a brief address, fittingly introduced the speaker of the occasion, W. Bourke Cockran, of New York.

#### Address by W. Bourke Cockran.

If there be any one capable of disputing that, aside from the establishment of Christianity, the foundation of this republic was the most memorable event in the history of man, we would not be apt to seek him at this board or to find him in this country. And if the foundation of this government be the most momentous human achievement of all the centuries, then clearly the appoint-

ment of John Marshall to the Chief Justiceship of the United States was the first event of the last century no less in the magnitude of its importance than in the order of its occurrence.

To the judicial career whose initial stage we celebrate this country mainly owes its independent judiciary — the unique feature of our political system — the distinctive contribution of American democracy to the civilization of the world — the vital principle of constitutional freedom — on which depend the strength which this government possesses, the fruit which it has borne, the cloudless prospect which it enjoys.

It is certainly beyond dispute that this government, which is the freest, is also the most stable in the world. During the period of its existence what changes have swept over the earth, what upheavals have convulsed society; what dynasties have been established and overthrown; what empires have risen and fallen; what political enterprises have been undertaken and abandoned; what constitutions framed in high hopes have perished in disappointment and confusion! It has seen the Whig oligarchy, which ruled England for a century and a half, give place to a republic preserving the outward form of monarchy only to veil the democratic character of its evolution. It has seen the king who aided these colonies to achieve their liberty immolated on the scaffold in the name of liberty, and France, after staggering through anarchy to military despotism, sink back into monarchy; and after again overturning thrones and stumbling once more into imperialism, while groping towards republicanism engage in a third attempt to establish some form of constitutional freedom.

It has seen Prussia rise from the ashes of defeat and

humiliation, and after humbling the pride of the Hapsburgs assume the military primacy of Europe when her king, raised to imperial dignity on the bucklers of his triumphant soldiery, proclaimed a new empire of Germany in the conquered halls of Louis the Magnificent. It has seen the Republic of Venice perish in its age and decay; the German principalities disappear from the banks of the Rhine; the ancient city of Leo and of Gregory become the capital of a new kingdom, and Spain begin to recover in the cultivation of her own lands the prosperity which she sacrificed in attempts to conquer other lands. It has seen the veil of darkness and ignorance rent in the East. As I speak, it sees the forces of Western civilization standing in the battered gateways of Far Cathay. And through all these changes, convulsions, revolutions, this republic stands to-day, as it went into operation one hundred and twelve years ago, unchanged in any of its essential features, except that its foundations have sunk deeper in the affections of the people whose security it has maintained, whose prosperity it has promoted, whose condition it has blessed.

To what must we attribute this stability which has maintained our government unmoved and apparently immovable on solid foundations amid the upheavals which have engulfed ancient systems? It is not explained by the lofty purpose which animated its founders, because other governments conceived in equally high aspirations have perished at the first attempt to put them in practical operation. It is not because it rests on a written Constitution, for the pathway of man is strewn with the wrecks of constitutional experiments. It is not because our Constitution declares certain elementary rights of man to be inviolable. Its provisions in this respect were

modeled on existing institutions. Their very language was not original. In terms as well as in substance they were borrowed from other charters of liberty. The French Constitution of 1793 and the declaration of the rights of man, which was made a part of it, contained even more elaborate provisions for the safety of the individual. But while the French Constitution was munificent in its promises of privileges to the citizen, the means which it adopted to secure them were inadequate and indeed puerile. You remember how that remarkable document sought to enforce its provisions by directing the constitution to be "written upon tablets and placed in the midst of the legislative body and in public places," that in the language of the Declaration "the people may always have before its eyes the fundamental pillars of its liberty and strength, and the authorities the standard of their duties, and the legislator the object of his problem." The Constitution was placed "under the guarantee of all the virtues," and the Declaration concluded by solemnly enacting that "resistance to oppression is the inference from the other rights of man. It is oppression of the whole society if but one of its members be oppressed. When government violates the rights of the people, insurrection of the people and of every single part of it is the most sacred of its rights and the highest of its duties."

The framers of that Constitution made the fatal mistake of assuming that to declare certain privileges the right of the citizen was equivalent to placing them in his possession. In practical operation, however, it was soon found that the sacred right of insurrection was too unwieldy a weapon to be wielded by a single arm. "All the virtues" proved but indifferent guardians for a Constitution assailed by all the passions. A mob thirsting

for the blood of a victim did not pause to read the measure of his rights on tablets, however legibly inscribed or conspicuously posted. The legislator menaced by an infuriated populace did not hesitate to seek his own security in the sacrifice of the lives of thousands without regard to "the object of his problem." The Constitution written with so much care, acclaimed with so much enthusiasm, adopted with so much hope, was suspended even before it went into operation. And when on the trial of Danton a decree was passed authorizing juries to declare themselves satisfied of the guilt of persons accused, at any stage of the proceedings against them, the last barrier for the protection of the citizen was swept away. Frenzied patriots and plotting demagogues combined to produce a wild reign of terror — a saturnalia of assassination. Violence became synonymous with patriotism; to be accused was to be condemned; to refuse participation in murder was to become its victim; the guillotine became the altar of popular sovereignty — exacting human sacrifices in ghastly abundance; the blood of the best and of the worst; of the most patriotic and of the most disaffected; of the philanthropic dreamer and of the brutal cutthroat; of both sexes, of every age, and of all conditions, drenched the soil of France — not as the stern ransom of liberty, but as a mad libation to anarchy and riot. The Constitution founded to protect the rights of man perished miserably after violating all of them, and republican institutions became discredited throughout Europe for a century.

The distinction between our republic and all others — which has made it a bulwark of liberty and order, while they have generally become engines of oppression and sources of confusion — is not in the varied extent of privileges promised by them, but in the different means which

they provide for their enforcement. Our Constitution was not committed to the "care of all the virtues," but to the courage, wisdom and patriotism of an independent judiciary. The whole security of our political system rests primarily on Article III of the Constitution, which provides that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish; and that the judicial power shall extend to all cases in law and equity arising under the Constitution and laws of the United States and treaties made under their authority; to controversies between two or more States, between a State and citizens of another State, and between citizens of different States. This is the corner-stone of our political structure, but not the force which secures this government firmly on its foundations. The experience of France, and indeed of this country, shows that constitutional provisions of themselves are but mere admonitions, always disregarded in practice unless adequate instrumentalities are provided to enforce them. The actual character of a constitutional government depends less on the words of its Constitution than on the interpretation which they receive. It was not the Constitution as drawn up by its framers, but the Constitution as interpreted by its judges, which the greatest Englishman of modern times described as the most perfect work ever struck off at a given time by the mind of man. Marshall found a plan, he placed it in effective operation; he found certain declarations in favor of individual safety, he made them the panoply of individual rights; he found a written Constitution, he made it a constitutional government.

In fixing the credit due to Marshall's judicial career it



is not necessary to belittle the wisdom and foresight of the men who wrote the Constitution. No structure can be stronger than its foundation. John Marshall could never have raised the Supreme Court from the weakness in which he found it to the power and majesty in which he left it if the Constitution had not afforded him an adequate field for the fullest exercise of his constructive genius. It would be superfluous, in this presence, to discuss or even to mention the long series of decisions through which he made the promises of freedom embraced in the Constitution actual possessions of the American people. It is enough to say that during his judicial service of thirty-four years in deciding many controversies arising in every part of the Union he succeeded in establishing four great principles which underlie our whole constitutional system and which constitute its main support:

First — The supremacy of the National Government over the States and all their inhabitants.

Second — The supremacy of the Constitution over every department of government.

Third — The absolute freedom of trade and intercourse between all the States.

Fourth — The inviolability of private contracts.

It is true that these principles are now regarded as axioms of civilized society too obvious to be questioned in a nation capable of constitutional government, but the universal respect in which they are held is entirely due to the courage, resolution and ability with which Marshall asserted and maintained them. If no attempt to violate them had ever been made by the States or by Congress, no occasion would have arisen for the decisions which vindicate them so clearly that no respectable au-

thority can now be found to challenge them. It is true, as the distinguished chairman of this banquet says, that the supremacy of the Constitution over Congress and the Executive was asserted by Judge Paterson in a charge to a jury delivered long before Marshall assumed the ermine. It is equally true that at a still earlier period—in 1788—Alexander Hamilton devoted a number of the *Federalist*—I think it was the 78th—to proving that it was the right and duty of the judiciary to set aside a law which contravened the Constitution. Indeed, I believe the principle had been asserted in some of the colonies before the Revolution. But, Mr. Chairman, there is nothing new under the sun. Marshall did not discover or establish any new principle of liberty, nor did this Constitution embrace one, but Marshall did devise an effective plan for making declarations of ancient principles practical features of civil government. Man can no more invent a new principle than he can invent a new force. The limit of human ingenuity is exhausted when new devices are found for utilizing forces which are eternal. The force which moves the steam engine existed since the beginning of the world, but it never was available for the use of man till Watt devised an effective machine. Liberty was always an aspiration to cherish, but never till Marshall made this Constitution effective did liberty become a possession to enjoy.

Marshall brought to the interpretation of the Constitution the love of a patriot, the wisdom of a statesman, and the ardor of a partisan. He had followed the debates of its framers in Philadelphia; he had successfully urged its adoption in the Virginia Convention against the eloquence and overshadowing authority of Patrick Henry. Every peril which it escaped in the progress of its evolu-

tion, every criticism of its provisions, every apprehension expressed of its operations, were signal lights, warning him of dangers which threatened it and suggesting possibilities of further development which in after years he improved to the utmost.

In the very general disposition to treat the Constitution as a mere treaty between independent sovereignties which might be disregarded at pleasure by any of them he discerned a danger against which he warned his countrymen from the judgment seat almost as soon as he ascended it. From 1804 in the cases of the United States against Fisher to the last day of his service he never missed an opportunity to assert the supremacy of the Federal Government on all matters committed to it by the Constitution as the vital principle of our national existence, nor to show by irresistible logic that to question its sovereignty was to plot its destruction. This was the doctrine on which patriots always supported the Union—for which Webster contended in the Senate—for which armies battled during four long years, and which was finally affirmed on the battlefield when the sword of the Confederacy was surrendered to the triumphant forces of the republic.

In the opposition expressed in the Philadelphia Convention to establishing United States courts of inferior jurisdiction and in the suggestion that the enforcement of the Federal Constitution and laws should be confided to the State courts, he detected a disposition to emasculate the Federal judiciary by making it a body without limbs, and when occasion arose in 1809 he issued that *mandamus* to Judge Peters which made the subordinate courts of the United States the vigorous and effective hands of the Constitution—enforcing its provisions in

every locality—bringing the Federal law to the doorway of the citizen—maintaining the supremacy of the United States in every square foot of their territory—without interfering with the power of the State to deal with matters concerning itself and its own citizens, except to administer its justice according to its own laws when they were invoked by a stranger against a resident. And when in the subsequent case of *Hunter's Lessee* he established the right of the Supreme Court to review any proceedings of a State tribunal which involved a question arising under the laws or Constitution of the United States, he converted the State courts from possible obstacles to Federal authority into additional agencies for the enforcement of Federal laws.

In the proposal so strongly urged in the Philadelphia Convention to empower the judges of the Supreme Court to advise the legislative and the executive departments in the discharge of their functions he detected an apprehension that under a republican form of government parliamentary bodies and executive officers might be carried to excesses by violent gusts of popular opinion, and in the case of *Marbury against Madison* he quieted that distrust forever by assuming for the judiciary the right and the duty to enforce the Constitution against any attempt to invade it by any other department, or by all the other departments of government combined, on the complaint of any citizen whose rights might be imperiled by the encroachment.

Freedom of trade between the States was secured when in *Gibbons against Ogden* the jurisdiction of the Federal Government was established over the navigable waters of the United States, whether inland rivers or harbors of the sea, and when in the subsequent case of *Brown against*

the State of Maryland — which might be called the original “original package case”— it was held that the State had no power to impose any tax or duty by way of license or other pretext upon the products of other States seeking access to its markets. To these and the subsequent decisions constituting the body of law governing interstate commerce we are indebted for the profound peace which reigns between the States; for if one State had been allowed to impose discriminations in matters of trade or communication against the citizens of another, each imposition would have been followed by reprisals leading in turn to fresh retaliatory measures, until a state of commercial war would have been the normal relation between all the States. It is the history of humanity that a conflict of interests is usually followed by a conflict of arms.

The Dartmouth College case, which established the inviolability of contracts, was an industrial bill of rights to the people of this country. It has proved the very fountain of the prosperity which they have achieved and of the greater prosperity which awaits them.

It is surely unnecessary to argue in this presence that on the sacredness of contracts depends the industrial co-operation of man, and co-operation is the mainspring of industry. For who would work and toil unless he felt that he could exchange the product of his labor against the commodities produced by the labor of others upon conditions of his own making? Who would sow a field, or turn a single furrow with the plow, or swing a pick-axe in the bowels of the earth, or shiver to-night upon the front platform of a street car, if he doubted the payment of the wages which he had contracted to receive, or if he did not know that other men are producing the shoes, and the clothes, and the food essential to his ex-

istence and which they will gladly exchange for the proceeds of his wages pursuant to contracts freely made between them?

While the whole industrial activity of man depends upon his belief in the fulfillment of contracts, there is often a strong tendency in legislatures and governments to repudiate debts or obstruct their collection. When, therefore, Marshall placed the obligation of contracts beyond the power of any State to disturb, he made the industry of this country the most prosperous in the world by making its fruits the most secure.

If I were to summarize Marshall's service I should say that on the solid foundation of the Constitution he made power, justice, peace and prosperity the four great pillars of our governmental system — power by establishing the sovereignty of the General Government over the States, thus making it the strongest nation in the world; justice by establishing the dominion of the Constitution over all the departments of government; peace by establishing freedom of intercourse between all the States; prosperity by establishing the inviolability of private contracts. The decisions of Marshall's successors, without disturbing these pillars, have strengthened them, and the stately fabric of government which they support.

The stability of the Union has been secured as much by forbearance in refusing to exercise powers not properly belonging to it as by firmness in enforcing those essential to its existence. The inviolability of contracts has not been allowed to pervert franchises granted for the public convenience into monopolies beyond the power of the State to control. The right of every citizen to trade, move or labor everywhere throughout the whole territory of the United States on equal terms with all

others has not been allowed to interfere with the right of each State to protect health, order and morals within its limits — the only restriction on its police power being the requirement that every exercise of it must apply equally to citizen and stranger under its jurisdiction.

It is perhaps the most extraordinary feature of our political system as it is the most impressive tribute to Marshall's genius that the power of the judiciary — now unquestioned — to fix the limits of its own authority and the authority of all other departments rests not upon any specific provision of the Constitution, but on a principle of construction first announced authoritatively in the case of *Marbury against Madison*. The approval bestowed on that momentous decision and on every subsequent amplification of its doctrine has been so universal that the judicial department has been encouraged to extend the buckler of its authority over an ever-widening field, until it has become the dominant force in our national life — the one element which through all our existence has steadily grown in power and beneficence. Never has the Supreme Court exercised its supreme power of setting aside a law of Congress or of a State that the people did not sustain its course with substantial unanimity. With the exception of the Eleventh Amendment, there is not in the history of the United States, or of any State, a single instance in which the people consented to a constitutional provision limiting the power of the judiciary, while the tendency everywhere has always been to enlarge it. While this respect for the judiciary remains a conspicuous feature of our national life no peril to our institutions can ever become serious.

It is often said, and I think with truth, that the close of the nineteenth century witnessed a decline in the popu-

larity of those parliamentary institutions which, at its beginning, were universally believed to be the sure panacea for all social or economic ills. In France, in Austria, in Italy and in Spain legislative chambers have sunk into universal contempt. Even in England the House of Commons has so far declined in popular respect that the House of Lords now assumes to reject its measures without fear of popular condemnation. In the present temper of the English people, if Edward VII. were possessed of real abilities, he might be able to impose his authority on both houses. If, for instance, he were to lift his voice now for justice to the Boers and denounce the South African war as a conscienceless manoeuvre of parliamentary politicians for political advantage, I believe that the conscience of the country would sustain him, as I know the public opinion of the world would applaud him, and Parliament would very probably be compelled to follow him. It would need but a few such exercises of leadership to make his authority permanent over both houses, for obedience is largely habit. Indeed, it is by no means impossible that the importance of the Crown, which began to decline after the death of Elizabeth, may begin to revive after the death of Victoria. In this country, representative bodies have not escaped the disrepute which has overtaken them in other lands. With us corruption is sometimes attributed to Congress, quite generally to State legislatures, universally to municipal councils. But in our government there is one department untainted by any breath of suspicion, to which the people are so passionately attached that the slightest attempt to disturb its independence or even to review its decisions at the ballot box would be the ruin of the political party suggesting it. Where Parliament is supreme, corruption of



legislative bodies undermines the life of the whole State, for when the omnipotent source of power itself becomes corrupt, all the streams which flow from it must be tainted, and laws springing from greed are sure to be administered for the plunder and oppression of the people. Under such conditions industry languishes, prosperity withers, civilization itself is imperiled. But under our democratic government the right of the citizen to come and go as he pleases, the right to enjoy his property, to exchange the product of his industry against the commodities produced by others, depend not upon the honesty of the legislature, or the loyalty of the executive, but upon the virtue and independence of the judiciary. If corruption exists in this country it can only affect the bestowal of favors by the government, it cannot endanger the life, liberty or property of a single individual. There may be partiality — corruption, if you will — in the bestowal of public franchises, of public offices and of public contracts, but while there is none in the administration of justice, while the courts remain true to the example and precepts of Marshall, all the essential rights of the citizen are as secure as the earth under his feet — they can no more be invaded than the stars in heaven can be blotted from his gaze.

One hundred years after the establishment of our Constitution what purpose expressed in its preamble remains to be accomplished — what hope cherished by its framers is unfulfilled? I know of none. Look around you and tell me if this be an idle boast. Has not the Union been made perfect through the wisdom of the great magistrate who showed its necessity and the blood of the heroes who cemented it? Is not justice firmly established by the unquestioned dominion of the Constitution? Is

not domestic tranquillity absolutely insured since perfect freedom of intercourse and trade removes all provocation to hostile acts or feelings between the States? Is not the common defense abundantly provided for by the overwhelming strength of a populous nation whose every inhabitant would die for the integrity of its soil and the glory of its flag? Has not the general welfare been promoted beyond the wildest hopes of the fathers since the security of property encourages industry to wring measureless abundance from a fruitful soil? Are not the blessings of liberty secured for ourselves and our posterity beyond fear of invasion or danger of abridgment by the effective protection which the judiciary casts over the essential rights of every citizen?

But the authors of this Constitution, in framing Article III, builded even wiser than they knew. At this moment the court is considering the gravest question ever submitted to a judicial tribunal in the history of mankind. Within a few days it must decide whether the Government of the United States, or rather whether two of its departments, can govern territory anywhere by the sword, or whether authority exercised by officers of the United States must be controlled and limited everywhere by the Constitution of the United States.

I do not mention this momentous question to express the slightest opinion upon its merits, but merely that this assemblage of judges and of lawyers may realize the part which the judiciary is now required to play in determining the influence which this country must exercise forevermore in the family of nations. The power of Congress to acquire territory is of course unquestioned, but the disposition to exercise that power will always be controlled by the conditions under which newly-acquired

territory must be held, and these conditions the court must now prescribe. On the one hand it may hold that wherever power is exercised under the Constitution there the limitations of the Constitution must be obeyed — that wherever the Executive undertakes to administer, or Congress to legislate, there the judiciary must enforce upon both respect for the organic law to which they owe their existence. If this doctrine be established it is clear that no scheme of forcible conquest will ever be undertaken by this government, for the simple reason that there can be no profit in such an enterprise. On the other hand the court may decide that Congress can hold newly-annexed territories on any terms that it chooses — that it may govern them according to the Constitution or independently of it — that they may be administered to establish justice among the governed or for the glory and profit of the governors. If it be held that government for profit can be maintained under the authority of the United States, conceive the extent to which it may be carried and the consequences which it may portend. If it be possible to maintain two forms of government under our Constitution, it is possible to establish twenty in as many different places. Territory may be annexed to the North, to the South, to the East and to the West. The President of the United States may be vested with imperial powers in one place, with royal prerogatives in another, and perhaps remain a constitutional magistrate at home. He may be made a military autocrat in some South American state, an anointed emperor in some Northern clime, a turbaned sultan in some Eastern island. Nay, more, Congress can move itself and the seat of government from Washington to some newly-annexed territory governed by officers of its own creation, subject to

its own unlimited power, and thus take both outside the jurisdiction of the Supreme Court.

Has the world ever before seen — could the framers of this Constitution have conceived — a bench of judges exercising such a power amid the universal submission and approval of the whole people. And more extraordinary than all, this submission remains unanimous though the decision of the court may seriously affect its own position in the structure of our government. For if it be held that the Constitution does not extend of itself over newly-annexed territory, then clearly the authority of the court cannot extend to it except by the action of Congress and the Executive. If the authority, that is to say, the existence of the court in any part of the territory of the United States, depends upon the other departments, then it is idle to contend that it is an independent and co-ordinate branch of the government. To decide that the executive and legislative departments have the right to govern territory outside the Constitution the court must deliberately renounce the importance which it has heretofore enjoyed and accept for itself an inferior place in our political system.

To me this is the most sublime spectacle ever presented in the history of the world. Think of it! A war has been waged with signal success, vast territory has been exacted from a conquered foe; a great political campaign has been fought and won upon the policy of taking this territory and governing it at the pleasure of Congress and the Executive, yet if the court should hold that what the Executive has attempted, what Congress has sanctioned, and what the people appear to have approved at the polls is in contravention of the Constitution, not one voice would be raised to question the judg-

has proved the safety of our Government by fixing the limitations within which its power is absolute, beyond which it may not pass? Great as have been the services which the American Judiciary have rendered already to civilization, I do not believe, my friends, that the wisest man can measure the contributions which it will make to the science of government in the years that are to come. What is the purpose of government? I believe it was Lord Brougham who said that the English government with all its ramifications, its king and its officers of state, its Houses of Parliament and its courts of justice, its lords, its commons, and its judges, its armies and its navies, all culminated in bringing twelve good men into the jury box. That statement is striking and original, but inadequate. The jury is but an incident,—perhaps the most important incident,—but still merely an incident of government,—not its ultimate object. The ultimate aim and purpose of government is to promote the effective cultivation of the earth that by an increase in the volume of its product the number of human beings may be multiplied that can be supported upon its surface. The first essential of abundant production is the preservation of peace.

The American judiciary has been the most effective agency ever evolved from human wisdom for the vindication of justice, and justice is the only reliable foundation of peace. By establishing peace among the States it has obviated the necessity for standing armies and increased immeasurably our national prosperity by directing every pair of human hands to the productive employments of industry, diverting none to the destructive and wasteful enterprises of war. Never has a population increased so rapidly while every increase in the number of

men has been attended by a still greater increase in their possessions. The gloomy theory of Malthus that the tendency of population was to grow more rapidly than the supply of food, and therefore that war, pestilence, famine and vice as checks to population were inevitable conditions of human life has been refuted and exploded by the experience of this country. We have established beyond all doubt that the food supply of the earth is not a limited quantity, but is capable of measureless increase — that the earth is not an unnatural mother producing creatures beyond her capacity to support, but a generous mother ready to yield abundant subsistence to every human being engendered upon her bosom, if men will but approach that fountain of sustenance in peace and industrial co-operation. Here at least every man produces more than he consumes, and as his surplus product goes into the common fund, it widens the field of employment for others. Every addition to our population instead of being an additional charge upon a limited food supply is a source of additional abundance. If there be any limit on the power of the soil to support human beings it is imposed by the wickedness or folly of men, not by the parsimony of nature. To support a population however large, growing in prosperity as it grows in numbers, it is only necessary that all men shall be allowed to approach the earth in peace, to exercise all their faculties in its cultivation, without wasting any of their energies in mutual conflict. As our population grows the comforts of our citizens grow; their houses are larger, their clothing is warmer, their food is more abundant, their books are of higher merit, their schools are more extensive, their hospitals are more efficient, the productive power of their hands is multiplied, and the horizon of their hopes is widened.

The dangers to peace do not all spring from foreign aggression, nor are they confined to domestic insurrections. A new peril has arisen to disturb industry born of the prosperity which it creates. The division of the earth's product among the laborers who create it has provoked conflicts as bitter as any that ever arose over the division of the earth's surface among the nations which inhabit it. Industrial disturbances cannot be settled by force or by mere enactment of statute laws. Between individuals as between states, peace can never be permanent unless it is built upon justice. By ascertaining the true economic laws governing the relations of men engaged in production, and by applying them fearlessly and impartially to controversies as they arise, the crowning service of the judiciary will be rendered — the final triumph of judicial statesmanship will be achieved. I have no fear that this consummation is impossible or even remote. Looking back over the history of this country I cannot entertain a doubt of its security or of its future. While the judicial department remains the depositary of our rights and liberties — the ark of our political covenant — while the courts remain the inviolable sanctuary of justice, the Constitution will remain the secure foundation of the principles established by Marshall, and this government will continue to be the temple of freedom, the bulwark of order, the light of progress, the supreme monument of what man has achieved, the inspiring promise of the boundless future that awaits him.

## STATE OF NEW JERSEY.

Marshall Day was celebrated in New Jersey at a dinner given by the Camden County Bar Association at the Library of the Association in Camden. The arrangements were made by a committee consisting of Schuyler C. Woodhull, F. Morse Archer and S. Stanger Iszard. The President of the Association, Benjamin D. Shreve, presided, and Mr. Justice Garrison, of the Supreme Court of the State, acted as toastmaster. An introductory address was made by Attorney-General Grey. This was followed by an address by David J. Pancoast, one of the Vice-Presidents of the Association.

### Address of Samuel H. Grey.

I rise, Mr. President and gentlemen of the Bar Association, to drink to the memory of John Marshall, the great Chief Justice, whose name with that of Lord Mansfield is synonymous with that lofty courage, broad statesmanship and enlightened sagacity which characterize these the greatest judges the world has yet seen. I shall not seek to trace through Marshall's boyhood days those indications of the character which he later developed; it is enough to say that from his mother he received a taste for the choicest English literature and that the whole atmosphere of the family life which surrounded him was impregnated with the best literary spirit of the age. At twenty-two he was a captain in the Revolutionary Army, and at this early age he was distinguished for that excel-



lent judgment and marvelous common sense which always characterized him. He was in battle at Trenton, at Germantown, at Monmouth and at Stony Point, and bore himself so well that he was brought into personal contact with Washington (upon whose staff he served), as well as with other eminent and distinguished soldiers in that great contest, which changed the thoughts of men from serving the King with loyalty to serving the States with devotion. A revolution indeed which gave to all men everywhere a new aspiration and awakened a new passion in a desire for liberty regulated by law. After the capture of Cornwallis had practically ended the Revolutionary struggle he married and took up at Richmond the practice of that profession, the noblest of them all in its vast possibilities for the good of men, in which he was to excel and become the great exemplar of all that was best and wisest in the administration of the law. The elements of leadership were born in him and he soon manifested them and became, while still a very young man, the leader of the Bar of the great State of Virginia, and his subsequent selection as a member of the State Convention was but a just recognition of his place among those, few indeed in number, who are leaders in the almost untrodden paths reserved for the truly great. He supported the Federal Constitution with a lucidity of statement and a convincing logic which illuminated the subject and demonstrated the soundness of his views. After the adoption of the Constitution, he, with Gerry and Pinckney, was sent to France, where he acquitted himself so admirably that upon his return he was received with the utmost enthusiasm. He afterward ran for Congress at the personal request of Washington, and later, during the administration of Adams, he became a mem-

ber of his Cabinet. He was appointed Chief Justice upon the resignation of Chief Justice Ellsworth in November, 1800, and commissioned for that great office January 31, 1801. On the 4th of February, 1801, he was sworn in as Chief Justice of the Supreme Court of the United States. He was, and is, *facile princeps*. Chiefest of all that splendid body of jurists which have heretofore adorned that great tribunal, unparalleled in the world in the extent and character of its jurisdiction, before which the nation and its meanest citizen stand on equal ground. The majesty of the one does not raise it above the law; the insignificance of the other does not leave him beneath its protection.

Let us drink, sir, to the memory of this great Judge, who so interpreted and applied the principles of our organic law that it rests as firmly upon the political system of our country as the mountains stand upon our soil, forever pointing the way toward eternal liberty and perpetual union.

**Address of David J. Pancoast.**

Upon the resignation of Chief Justice Ellsworth, Marshall did not seek his place, but, on the contrary, advised President Adams to appoint Justice Paterson, of New Jersey, who had been on the Supreme Court bench for some years, and is well known to all New Jersey lawyers as one of our early Governors and Chancellors, and the compiler of Paterson's laws, published in 1800. Instead of promoting Paterson, Adams, following his own inclination, on the 31st of January, 1801, just before the close of his term, appointed Marshall, who was then Secretary of State, Chief Justice in Ellsworth's place. On the 4th of

February following, just a century ago, Marshall quietly, and in an unceremonious manner, took the oath of his new office, and entered upon his judicial duties at the first session of the court held at Washington, unconscious of the great importance of the event to his countrymen in the centuries to follow. Before this appointment, he had been offered and declined the offices of Attorney-General, Associate Justice, Secretary of War and Minister to France. His predecessors in the great office of Chief Justice were Ellsworth, Rutledge and Jay, in the order named. At the time he was made Chief Justice he was in the prime of life, being only forty-five. Some criticism has been made of his conduct, after his appointment to the Supreme Court, in remaining temporarily in Adams's cabinet and industriously assisting him in making new appointments to Federal offices that should have been left to Jefferson's incoming administration, especially in view of Jefferson's assurance that Federalists would not be removed or superseded without good and sufficient cause. It is, however, but just to the memory of Marshall to say that the facts upon which this criticism rests are disputed.

The appointment of Marshall as Chief Justice was one of the dying efforts of the Federal party to perpetuate its loose construction principles; but it was not without wholesome effect, as subsequent events in the Supreme Court, under Marshall's leadership, proved. It gave the judicial department of the Federal Government a Federalist or free movement that has finally molded the Constitution into its present acceptable form.

In February, 1801, near the end of the VIIth Congress, the Federalists, to further intrench themselves in the judicial department, passed an act creating new Federal

courts, which gave President Adams the appointment of sixteen new judges, whose commissions Adams made out and delivered just before the expiration of his term. These appointments were by the anti-Federalists derisively called the "Midnight Judges."

Jefferson did not like Marshall either politically or personally, but, recognizing his great ability, invited him to remain in his Cabinet until his successor should be selected; and at the same time denounced the appointment on March 3d of the midnight judges and other officials, by President Adams, without any censure of Marshall, who was said by some to have been employed in the scheme of filling all vacant offices with Federalists at the last moment of Adams's administration. Upon his elevation to the bench the degree of LL. D. was conferred upon him by Princeton College.

Marshall's appointment to the position of Chief Justice was the beginning of a new era in the history of government and constitutional law. No government had ever before been established by the people concerned, in which the sovereign powers were divided into three equal and co-ordinate departments—legislative, judicial, and executive; and it remained to be seen whether this distribution and balancing of powers would lead to harmony or confusion; whether the government so established would be perpetuated in order and peace or speedily dissolve and end in anarchy and war, and be succeeded by a stronger form of government with the sovereign powers confined to fewer hands, after European models. Virgin America was the place and Marshall's day the time for this great trial in the experiment of republican institutions, based upon the equal rights of all men before the law.

The force and effect of the judicial department on the future of the government was yet to be determined; whether it was to play an obsequious or inferior part in the scheme under the Constitution, or take and keep its high rank as one of the three equal powers of government, was to be settled; and very much at the start depended upon the composition and complexion of the Supreme Court, whose function was to declare the law relating to differences between States, and between citizens of different States, and as to treaties, acts of Congress, and the powers of the Executive under the Constitution.

Before the adoption of the Constitution, no court in the civilized world had ever been possessed of such vast jurisdiction and authority. The power of the judicial department of the government to define the limits of the fundamental written law was a novelty in government which the rest of the civilized world looked upon with wonder and amazement, and with the expectation of its speedy failure, inspired by the wish that it would not succeed. Marshall, therefore, as the head of the court, had an unexampled opportunity to do a great service to his country and to mankind, which his patriotism and his genius for the law enabled him to embrace and thereby enroll his name on the scroll of fame not below that of any other judge or jurist in the history of the world.

Ex-President Adams, in his old age, told Edward O. Marshall, the youngest son of the Chief Justice, that his gift of John Marshall to the people of the United States was the proudest act of his life. Marshall once speaking of himself told his son that he preferred to be Chief Justice to being President. It is to be hoped for the good of

the bench and the country that all future Chief Justices will entertain the same patriotic and noble sentiment.

He took hold of the judicial work of his court with the hand of a master, and he guided it with such learning, probity and wise discrimination through all the intricate and doubtful labyrinths of the law as to elevate and keep the court, during his judicial career, on the high plane intended for it by the framers of the Constitution.

It was fortunate for the Supreme Court and for constitutional law that Marshall was a Federalist, and not in sympathy with Jefferson's strict constructionist ideas, else the former might have molded the law to suit the political views and policy of the administration of the latter, and placed the court under the domination of the Executive Department—a thing subversive of that independence requisite to the proper working of the constitutional scheme of our government.

As a judge, Marshall was not so much distinguished for his judicial learning, that is, knowledge of cases and mere book law, as for his clear comprehension of fundamental legal principles and of their appropriate application to any given case. Story, his associate on the bench, was noted for his great legal erudition and knowledge of authorities and acquaintance with books; and it is said that, in working together on a case, Marshall would not infrequently state the principles that should govern its determination and leave Story to furnish the authorities. Story once said of him, "that he readily evolved the true point of the case, even when it was manifest that he never before had caught even a glimpse of the learning upon which it depended." He was not naturally a laborious student. He loved to work in the broad field of rea-

soning and generalization rather than in the cramped and narrow bounds of mere case-law founded upon dusty precedents.

The learned Pinkney of Maryland, after listening to the reading of several of Marshall's opinions, said: "He was born to be a Chief Justice in any country in which he lived." It has been said of him by another that he "was a judge solicitous to hear arguments and reluctant to decide cases without them." How unlike some later-day judges, who seem to imagine that they cannot be informed or instructed by the argument of counsel, and listen to it as though it were a thing to be tolerated, but not in the least degree to be encouraged.

Marshall had the gentleness and diffidence that marks the truly great mind. It has been said that he never made an enemy. He presided over the court during the administrations of John Adams, Thomas Jefferson, James Madison, James Monroe, John Quincy Adams and Andrew Jackson — a period of thirty-four years; and his judicial labors are recorded in thirty-four volumes, commencing with 1st Cranch and ending with 9th Peters. . . .

In the trial of Burr for his alleged treasonable practices in his Utopian attempt to found a Southwestern Empire, Marshall held that he was entitled to a *subpoena duces tecum* for President Jefferson. The propriety and legality of the Chief Justice's ruling on this point has not been universally accepted, but his decision to the effect that Burr was not technically guilty as charged, under the facts proved, has been generally received as entirely sound. While what he did seemed to imply that he was against Jefferson and for Burr, as he once was in politics, yet, as a matter of fact, he simply did with true judicial courage what he thought was right and according to law.

Marshall, at the solicitation of his associate, Judge Bushrod Washington, to whom General Washington bequeathed all his papers, wrote the life of Washington, at an inopportune time and under unfavorable circumstances. The work, which was published in several volumes, the first of which appeared in 1804, was not generally well received, and did not add either to the fame of Washington or that of its author. It was labor done out of his chosen field and largely lost both to himself and to the world. It did this good, however: it collected and preserved a great many facts in relation to Washington which have been useful to later historians.

He was in the Constitutional Convention for the adoption of a new Constitution for the State of Virginia, in 1880. With him in that convention were many distinguished men, including Madison and Monroe, with the latter of whom he attended school in his boyhood days, all three aged and venerable in appearance. A writer of the times, referring to Marshall's presence, said: "Whenever he spoke, which was seldom, and only for a short time, he attracted great attention. His appearance was revolutionary and patriarchal; tall, in a long surtout of blue, with a face of genius and an eye of fire." In the convention he acted as moderator, and on questions which brought out serious differences of opinion he led the way to harmony by suggesting a compromise on middle and conservative ground that all could agree upon. In one of his speeches he said, in the spirit of moderation, concession and compromise characteristic of him: "Give me a constitution that shall be received by the people; a constitution in which I can consider their different interests to be duly represented, and I will take it though it may not be that I most approve." In his remarks upon



the question of the courts to be provided for, he said: "The greatest scourge an angry heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt or a dependent judiciary." He was at this time about seventy-five years old, and though somewhat enfeebled in body, his mind was unimpaired and active, and he continued ably to discharge his judicial duties.

His last judicial utterance was in the important case of *Mitchel and others v. The United States*, involving the rights and titles of the Indian tribes to lands in Florida, 9th Peters, 723, January term, 1835. A motion for a continuance of the case on the part of the Government having been made, Marshall, then about eighty years of age, ruled upon it, and in part spoke as follows: "The court has taken into its serious and anxious consideration the motion made on the part of the Government to continue the cause of *Mitchel v. The United States* to the next term. Though the hope of deciding causes to the mutual satisfaction of parties would be chimerical, that of convincing them that the case has been fully and fairly considered, that due attention has been given to the arguments of counsel, and that the best judgment of the court has been exercised on the case, may be sometimes indulged — even this is not always attainable. In the excitement produced by ardent controversy, gentlemen view the same object through such different media that minds not infrequently receive therefrom precisely opposite impressions. The court, however, must see with its own eyes and exercise its own judgment, guided by its own reason."

This last deliverance by word of mouth, on the spur of the moment, showed that advanced age had not to any appreciable extent beclouded or enfeebled his lofty intel-

lect. With that case his life work was done, and the great book of life was, as to him, soon to be closed with a record of his remarkable career.

Garfield said of him: "He found the Constitution a paper and he made it a power." His contemporaries were Chief Justices Kenyon, Ellenborough, Tenterden and Denman, and Lord Chancellors Eldon, Erskine, Lyndhurst and Brougham; but he borrowed nothing from them. He was made illustrious by the light of his own intellect. He interpreted and gave form and power to a written constitution that was wholly unknown to English jurisprudence. The rise and growth of our nation has developed many able men, but no one greater than Marshall, who, as soldier, lawyer, legislator, statesman, diplomat and jurist, filled all his different offices with great credit and honor to himself, advantage to his country and to the satisfaction of his countrymen.

On the 6th day of July, 1835, at Philadelphia, in his eightieth year, after an illness of but a few months, he died peacefully, without a struggle, at the hour of six o'clock in the evening, near set of sun, a fitting time for the close of such a beautiful and useful life. May we, as members of the profession of the law, regard and venerate him as a model to be imitated, and from his character and works learn a useful lesson to help us more successfully to deal with the complex problems of a lawyer's life.

His chief monument is in the lasting character of his judicial labors, to which every American lawyer and citizen may point with national pride through the coming centuries, so long as constitutional law and republican government shall survive in our free land. His brethren of the Supreme Bench inscribed to his memory

a brief obituary, which appears in the preface of the 10th volume of Peters' Reports, and is, in part, as follows: "His private virtues as a man, and his public services as a patriot, are deeply inscribed in the hearts of his fellow-citizens. His extensive legal attainments, and profound, discriminating judicial talents, are universally acknowledged. His judgment upon great and important constitutional questions affecting the safety, tranquillity and permanency of the government of his beloved country, his decisions on international and general law, distinguished by their learning, integrity and accuracy, are recorded in the reports of the cases adjudged in the Supreme Court of the United States, in which he presided during a period of thirty-four years. As long as the Constitution and laws shall endure and have authority, these will be respected, regarded and maintained."

No such spontaneous tribute of affection and respect has ever before in the history of the world been paid to a judge or jurist as that which is being paid to-day to the character and memory of Chief Justice Marshall throughout this great nation of seventy-six millions of people; and it is one of the signs of the healthful life of the Republic. May it long live to enjoy the blessing that he conferred upon it as the greatest expounder of its laws.

## COMMONWEALTH OF PENNSYLVANIA.

The centennial anniversary of the elevation of John Marshall to the office of Chief Justice of the Supreme Court of the United States of America, Monday, February 4, 1901, was celebrated in the city of Philadelphia, under the auspices of the Law Association of Philadelphia, the Lawyers' Club of Philadelphia, the Pennsylvania Bar Association and the Law School of the University of Pennsylvania.

The following is mainly taken from the official relation of the proceedings, separately published, with an excellent photogravure of the Inman portrait of Marshall:

At a meeting of the Law Association of Philadelphia, held October 2, 1900, the following resolutions were adopted:

*Resolved*, That a committee of five be appointed by the Chancellor to provide for a suitable observance, on February 4, 1901, of the centennial anniversary of the elevation of John Marshall to the office of Chief Justice of the United States; and

*Resolved*, That the State Bar Association, the Lawyers' Club of Philadelphia, and the other Bar Associations throughout the State and members of the Bar in general be invited to unite with this Association in carrying out the object of the above resolution.

The Chancellor appointed the following gentlemen members of that committee: John Cadwalader, Esq., Chairman; Hon. Wm. W. Wiltbank, George Tucker Bispham, Esq., Wm. Brooke Rawle, Esq., Alexander Simpson, Jr., Esq.

Subsequently the committee was increased to nine

members, and Messrs. Henry Flanders, William H. Staake, Edward P. Allinson and Hampton L. Carson were added to the Committee.

In response to this resolution, the Lawyers' Club of Philadelphia appointed the following committee: Hon. C. Y. Audenried, John R. Read, Esq., Richard C. Dale, Esq., John Marshall Gest, Esq., Joseph DeF. Junkin, Esq.

The Pennsylvania Bar Association: Hon. John B. McPherson, Victor Guillou, Esq., D. T. Watson, Esq., Hon. W. U. Hensel, O. La Rue Munson, Esq., J. B. Colahan, Jr., Esq.

The Faculty of the Law School, University of Pennsylvania: Hon. George M. Dallas, Prof. William Draper Lewis, Prof. John W. Patton,—as members of "a joint committee upon the suitable observance of the Centennial Anniversary of the elevation of John Marshall to the office of Chief Justice of the United States."

At a meeting of the Committee, held on the 15th day of October, 1900, it was

*Resolved*, That the Chairman of the Committee be requested to confer with Mr. Justice Mitchell of the Supreme Court of Pennsylvania, and invite him to deliver an address upon the occasion.

At a meeting of the Committee held on the 30th day of October, 1900, the chair announced the following sub-committee to formulate a programme or order of exercises for the day: Hon. John B. McPherson, Chairman; with him Mr. Victor Guillou, representing the Pennsylvania Bar Association; Hon. W. W. Wiltbank and Mr. Wm. H. Staake, representing the Law Association; Mr. Jos. DeF. Junkin and Mr. John R. Read, representing the Lawyers' Club.

This sub-committee organized by the election of Mr. William H. Staake as secretary.

The sub-committee recommended the following action, which was afterwards approved by the General Committee:

"That on Marshall Day, at 11 o'clock a. m., there be a meeting of the Bar in the room of the United States Circuit Court of Appeals, at which a formal minute should be presented to the Court, on behalf of the Bar, and your committee recommends that Samuel Dickson, Esq., Chancellor of the Law Association, an Ex-President of the Pennsylvania Bar Association, and a member of the Board of Governors of the Lawyers' Club, be requested to draft and present this minute to the Court."

Colonels Wendell P. Bowman, Henry T. Dechert and Robert Ralston, Jr., were appointed as marshals of the procession of the Bench and Bar; the Presidents of the three law classes of the University of Pennsylvania were appointed marshals of their respective classes.

All of the courts of the United States, the Supreme Court of Pennsylvania, and courts of the county of Philadelphia, in response to the request of the General Committee, adjourned on Monday, February 4, 1901, John Marshall Day, with the exception of the United States Circuit Court of Appeals, which held a special session, to receive the minute presented to the court on behalf of the Bar. This minute was prepared by Samuel Dickson, Esq., the Chancellor of the Law Association, and was presented in the unavoidable absence of Mr. Dickson, on account of sickness, by Richard C. Dale, Esq., of the Philadelphia Bar.

The expenses of the celebration, of the publication of the proceedings, and of placing a suitable memorial tablet in the room of the United States Circuit Court of Appeals,

were borne by a voluntary subscription of the members of the Bar of the City of Philadelphia.

A meeting of the General Committee was held on the eighteenth day of February, 1901, at which it was formally resolved that the residue of the moneys subscribed, and such other funds as may be received, should be used in procuring a tablet to be placed in the room of the United States Circuit Court of Appeals, and, if the funds of the committee should be sufficient, a tablet should also be placed on the house No. 426 Walnut Street (the old Crimm Boarding House), where Chief Justice Marshall died in 1835.

It was further resolved that the selection of the two tablets and the publication of the proceedings of the celebration should be referred to a special committee as follows: Henry Flanders, Esq., Hon. George M. Dallas, Samuel Dickson, Esq., Victor Guillou, Esq., Joseph DeF. Junkin, Esq., together with John Cadwalader, Esq., the Chairman, and William H. Staake, Esq., the Secretary of the General Committee. This committee organized on the twenty-fifth day of February, 1901, by the selection of Henry Flanders, Esq., as Chairman and William H. Staake, Esq., as Secretary. Messrs. Dickson, Guillou and Junkin were appointed a sub-committee to propose and report the literary composition of the inscription to be placed upon the tablet in the court room. Messrs. Cadwalader, Junkin and Guillou a sub-committee to propose and report upon the physical composition and form of the tablet and the contract for its erection. Messrs. Cadwalader, Dallas and Staake a sub-committee to confer with the judges of the United States Court of Appeals as to an appropriate site for the tablet.

By resolution of the committee the following will be the inscription upon the tablet:

Upon February 4th, 1901  
being the One Hundredth Anniversary of the day upon which  
JOHN MARSHALL  
took his seat as Chief Justice of the Supreme Court of the United  
States, the Chancellor of the Law Association of Philadelphia  
on behalf of  
THE LAW ASSOCIATION OF PHILADELPHIA  
THE LAWYERS' CLUB OF PHILADELPHIA  
THE PENNSYLVANIA BAR ASSOCIATION  
THE DEPARTMENT OF LAW OF THE UNIVERSITY OF PENNSYLVANIA  
acting for the members of the Bar of the  
Supreme Court and other Courts of Pennsylvania,  
moved the United States Circuit Court of Appeals  
for the Third Circuit  
then specially convened  
to enter upon its records a Minute  
expressing their appreciation of his character and work  
And it was thereupon  
SO ORDERED.

THE MEETING OF THE UNITED STATES CIRCUIT  
COURT OF APPEALS, MONDAY, FEBRUARY 4,  
1901, AT 11 A. M.

The Honorable George M. Dallas, the Senior Judge, presided. Sitting with him were the Honorable George Gray, Honorable William Butler, Honorable John B. McPherson and Honorable Andrew Kirkpatrick. The orator of the day, Honorable James T. Mitchell, LL.D., was also present upon the Bench.

The court being formally opened, Mr. Richard C. Dale, of the Philadelphia Bar, in the absence of Mr. Samuel Dickson, the Chancellor of the Law Association of Philadelphia, then addressed the court.



**Introductory Address and Minute.**

*May it please your Honors:*

At the approach of the one hundredth anniversary of the day on which John Marshall took his seat upon the Bench of the Supreme Court of the United States, there grew up a feeling throughout the country that the day should be marked by appropriate exercises, in which the services of the great Chief Justice might be recalled and some expression given to the affectionate veneration in which his memory is held by the Bench and Bar of the United States. For reasons which will at once suggest themselves to your Honors, it was recognized that, irrespective of what might be done elsewhere, it was essential that the day should be properly observed in this city, and the Law Association of Philadelphia accordingly appointed a committee, and requested the appointment of similar committees by the Pennsylvania Bar Association and the Lawyers' Club of Philadelphia, that they might unite in making the necessary arrangements for the occasion. A joint committee was then made up from representatives of the three organizations to take charge of the proceedings, and, by way of introduction to the exercises of the day, the committee appointed Samuel Dickson, Esq., the Chancellor of the Law Association, to prepare and present a Minute to your Honors, to be entered upon the records of the Court. In compliance with the direction of the committee, Mr. Dickson prepared a Minute, but was obliged to go abroad last week on account of illness. Before sailing, he requested me to present his Minute to the Court, and with your Honors' permission I will now read it, and ask that it be entered upon the records of this proceeding.

## MINUTE.

And now, February 4, 1901, the Law Association of Philadelphia, the Pennsylvania Bar Association, the Lawyers' Club of Philadelphia, and the Law Department of the University of Pennsylvania, acting on behalf of the Bar of Pennsylvania, move that the following Minute be entered upon the records of this court:

It is the hereditary privilege of the members of this Bar to express, upon every proper occasion, their veneration for the character of Chief Justice Marshall and their appreciation of his judicial work. He had been personally well known to the lawyers of this city while serving as a member of the House of Representatives in the session of 1799–1800, and when again here in 1831, he was requested by the Bar of Philadelphia to give sittings to Henry Inman, who painted the portrait which has passed into the custody of the Law Association and is the one authentic record of the form and features of the original. It was in pursuance, also, of the action taken at a meeting of this Bar, upon the announcement of his death, that the sculptor, Story, the son of his old colleague and friend, was engaged to model the statue now placed at the foot of Capitol Hill; but better than the likeness of the outer man by painter or sculptor is the masterly delineation of his mind and life in the Memorial Addresses delivered by Horace Binney and William Henry Rawle, and in the biographies by members of the Bar of this city, still living. Thus by the canvas of the painter and the bronze of the sculptor, and by words more lasting than either, this Bar has been diligent to preserve the memory of what manner of man the Chief Justice was in person and in achievement.

To the estimate made up by men so competent to measure his worth and to pass judgment upon his work, noth-

ing can profitably be added; and in his case contemporary opinion is exceptionally trustworthy. He was so simple and unassuming, so free from self-seeking or from any thought of self — so clear in his great office — and of such transparent simplicity and sincerity of character, that it has always been manifest that he was at heart just what he seemed to be, and it would never occur to any eulogist to claim, as a merit, that no record could ever leap to light to shame his memory. Nor is it possible, perhaps, to appreciate his opinions at this day as fully as at the time of their delivery. They are now familiar to every lawyer, and are become an integral part of the great body of law, which is learned by the student as established and accepted doctrine; but the lawyers who declared, in the address presented upon the occasion of his visit in 1831, that they could not but “consider the whole nation indebted to one who for so long a series of years has illuminated its jurisprudence and enforced with equal mildness and firmness its constitutional authority; *who has never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the full extent that duty required,*” belonged to a period when the questions with which he had been called upon to deal and decide were still unsettled, and when the law libraries of the day were barren of authority, so that they could understand the full force of Mr. Justice Story’s saying that “these exquisite judgments were the fruits of his own unassisted meditations.”

It is true, however, that time now enables us to understand, as they could not, how broad and deep and abiding was the impress which the Chief Justice was making upon the institutions and jurisprudence of the country. It is now apparent that the Federal Judiciary took shape and earned its commanding place in the life of the nation

through his labors. He began by proving that the Government of the United States deserved, as he himself expressed it, "the high appellation of a government of laws and not of men." The course of reasoning by which he demonstrated that all the departments of the Government were defined and limited by the Constitution, and that an act of Congress contrary to the Constitution was not law, and that the courts as well as other departments were bound by that instrument, compelled assent. The Constitution was thus made in fact the supreme law of the land and the test by which the court might be required, by any suitor, to measure the validity of any other law and the legality of any executive act. What followed was the development and illustration of this seminal principle, and in working out the problems as they subsequently arose, he laid down canons for the construction of the Constitution of the United States which are accepted as final authority, not only in determining the true meaning of the Constitution of the United States, but of the Constitution of every State in the Union; and while his judgments fixed the relations of the Federal and State Governments and of the States as between themselves; of the Executive and the Legislature to the Judiciary, and to one another, and defined the immunities and duties of foreign sovereigns,—they did a work no less important in making effectual the safeguards of personal rights and of private contracts, of the freedom of interstate commerce and of the navigable waters of the United States.

When his work is thus surveyed as a whole, it is manifest that this plain, simple man, who eschewed all ceremony and whose pleasure it was to live undistinguished from his fellow-citizens; who wore none of the insignia and wielded none of the resources of worldly rank or

power, was exercising an influence — decisive then, and accumulating and reduplicating ever since — greater than that of any statesman or soldier at home or abroad. The monarchs of Europe who were his contemporaries are scarcely remembered by name, with the exception of one, who gave his name to a code compiled by others, and the Code Napoleon is the only memorial left of the imperial sway which dominated the Continent. But the work of Marshall lives to-day and is more potent than ever. It constitutes an integral part of the body of law which enters into the daily life of every citizen, which maintains the autonomy of the States and the integrity of the Union, and by which the civilized nations of the world regulate their intercourse; and what is possibly of greater importance, the ready acceptance by the people of the United States of the decisions of their Supreme Court, in loyal submission to the supremacy of the law, is largely due to the impression made upon the country by his character and career as a man and as a judge.

To the tribunal which secured under him as its presiding magistrate the confidence of a nation of freemen, sovereign States gladly submit their strifes, and the destiny of millions of an alien race now awaits its decision. When the greatest of English chancellors was about to determine the rights and boundaries of "two great Provincial governments" — as he styled the colonies of Maryland and Pennsylvania — he said that "the cause was of a nature worthy the judicature of a Roman Senate rather than a single judge, and his consolation was that, if he should err in his judgment, there was a judicature equal in dignity to a Roman Senate that would correct it." The colonies of which he was to draw the boundary line were then comparatively uninhabited, but now equal or excel in numbers and wealth the Kingdom of Great Brit-

ain at the time when Lord Hardwicke took his seat upon the woolsack; and the Supreme Court would proceed to decide to-day a question of boundaries or any other controversy between them as if it were a question between private litigants. Compared to such an arbitrament as an instrument for ascertaining and declaring the very right of a dispute, armies and navies are but the surviving agencies of a lower civilization; and if the future is to attain to the ideal of a "Parliament of man and a Federation of the world," it will find the exemplar of its ultimate judicature in the court which John Marshall made a living reality.

It is therefore with heartfelt gratitude that we assemble on this anniversary to make, once more, formal and public acknowledgment of the obligation of our country and our profession to the wise and upright judge, who, one hundred years ago, assumed the duties of Chief Justice of the Supreme Court of the United States.

**Response of the Honorable George M. Dallas.**

*Gentlemen of the Bar:*

The constrained absence of Mr. Justice Shiras and of Judge Acheson, which we all regret, is especially deplored by that member of the court to whom, in consequence, the honor of speaking on its behalf has most inauspiciously descended. We regret, too, that Judge Buffington and Judge Bradford have been prevented from attesting by their presence the sympathetic interest which we have been assured they feel in the memorable proceedings of to-day.

This court has been convened solely for the purpose of enabling us to unite with you, and with our brethren of the Pennsylvania courts, in rendering tribute to the mem-

**Introductory Address by George M. Dallas.**

We have come together, ladies and gentlemen, to commemorate the accession to the office of Chief Justice of these United States of the foremost in the line of illustrious lawyers who have adorned that exalted station, and to acclaim our grateful sense of the inestimable benefits which, after the lapse of one hundred years, our country still derives from that event. For this opportunity to evince the veneration with which as soldier, statesman, jurist and citizen, we bear John Marshall in remembrance, we are indebted to the Law Association of Philadelphia, the Lawyers' Club of Philadelphia, the Pennsylvania Bar Association, and the Law School of the University of Pennsylvania. The members of the joint committee of these several bodies have discharged all the duties confided to them with ardent zeal, and now — despite the inclemency of the weather — assured success; but, above all, they are to be congratulated upon having most aptly selected, and most fortunately secured, as the orator of the day, a distinguished member of the highest judicial tribunal of this Commonwealth, at whose feasts of reason good digestion always waits on appetite. I know it will be as gratifying to you to receive as it is to the chair to present the Honorable James T. Mitchell.

**Address of Mr. Justice Mitchell.**

To the dweller on the plain, the neighboring hills which shut out the distant horizon seem to be the summits of the earth. But the traveler as he journeys onward finds the encircling heights gradually sinking to the general level of his enlarged and widening view, till the perspective brings all things to their true proportions.

In the estimate of men and of events the perspective of time is no less potential and no less necessary than the

perspective of distance in the estimation of things visible. The popular idols of to-day are forgotten of the morrow, while the silent and unnoticed great come forward to their true place. It is the habit of our minds to measure by periods. The new year suggests the retrospect of its predecessor with respect to ourselves and our daily lives, and so the new century naturally turns our thoughts to the wider field of history and our country in the century that has closed. The small prominences of ephemeral measures and men have come down to the common level, but when through the long vista of a hundred receding years one lofty figure has steadily risen above even the height at which its contemporaries placed it, then indeed we have the last and indisputable proof of its true eminence.

We have lived in an age of centennial commemorations. Twenty-five years ago, here in its birthplace, the Republic celebrated the first century of its existence, and revealed to itself as well as to the half incredulous world the unparalleled progress of the thirteen weak and scattered colonies to a place in the front rank of the nations of the earth. Since then we have had other centennials with appropriate celebrations, but none more notable than that which brings us together to-day. We are here to celebrate one of the greatest of the heroes of peace, to pay our willing and affectionate tribute of appreciation, of gratitude and of reverence to great public services, exalted personal character, and clear pre-eminence in the least showy and least obtrusive path of all the fields of intellectual effort. There is no criterion of any man's worth and work so sure as professional approval, and in no profession is judgment more unerring than in the lawyer's final estimate of the judge. For the judge must do his daily work in the open, before a trained and



sharply observant audience of critics learned in the subjects on which he is called to act, more minutely informed on each case than he can be, and viewing it with the stereoscopic result of eyes sharpened by individual interests at a different and conflicting angle. When, therefore, at the end of a century we find his countrymen, led by the legal profession, turning spontaneously to a fitting commemoration of the day that John Marshall took his seat as Chief Justice of the Supreme Court of the United States, we have a tribute not due to the glamour of temporary popularity, but to the cool and deliberate judgment of men who know. The honor of the first public suggestion belongs, I believe, to the Bar of Illinois. On a bronze tablet in one of the busiest streets of the second city in the Union you may read the date 1812 and recall from the accompanying inscription that eleven years after he took his seat as Chief Justice all that Marshall knew of the site of Chicago was the dread news that came from the depths of the Western wilderness that the Indians had massacred the little garrison of Fort Dearborn. History affords no more striking note of the changes a century may produce than that the site of that gallant little outpost, now the home of a larger population than that of the three largest States in 1801, first summons the Bar of the country to the commemoration of the greatness of the Chief Justice whose work was done for a young and experimental government, but was laid down on such broad and sure and permanent lines that expanding territory and teeming populations have not lessened its usefulness, nor in the least impaired its vigor.

The suggestion once made struck a responsive chord over the whole land, and to-day his fellow-citizens, his brethren in the profession, are gathered in every centre

of legal activity to bear witness that the lofty figure who was placed at the head of the judiciary a hundred years ago has continued to grow in height and eminence with the increasing years.

John Marshall was born September 24, 1755, at a small place called Germantown, now Midland, within the sunset shadow of the Blue Ridge in the valley of Fauquier county, Virginia. His ancestor, who had been a royalist cavalry officer in the service of King Charles, came to Virginia and settled in the famous county of Westmoreland, the birth place of Washington, of Monroe, of Richard Henry Lee and his famous brothers. There his descendant, Thomas, father of the Chief Justice, was born in the same year with Washington, was schoolmate with him in the scanty school days of their youth, acted with him as assistant in making surveys for the great landed proprietor of that day, Lord Fairfax, and served under him as Colonel of the Third Virginia Line at Brandywine, at Valley Forge and at Trenton.

In the history of that time few things are more notable than the precocity of the men. The situation called for early development. Men were scarce and work of every kind was all around them waiting for their hands. Energy and activity were in the air they breathed, and the impatience of the youthful spirit to assume the rights and duties of manhood was stimulated by the surrounding opportunities at an age which in an older community would have found them contented to be school boys. The surveys, the field-notes and the maps made by Washington at the age of sixteen, some of which you may see to-day in the collections of the Historical Society of Pennsylvania, attest the maturity as well as the activity of mind and body which resulted in the Virginia colonel at twenty-

three taking practical command and covering the retreat of the British regulars on the banks of the Monongahela. And the youthful Washington was but *primus inter pares* with his associates.

Thomas Marshall moved to Fauquier county, married Mary Isham Keith, the daughter of an Episcopal minister, and they had fifteen children, of whom John was the oldest. Fauquier was a frontier county, sparsely settled, and the opportunities of education of the future Chief Justice were limited. At the age of fourteen he was sent to Westmoreland to the school of the Rev. Archibald Campbell, where he had James Monroe for a fellow-student. After a year there he returned home and received further instruction in the classics from the Rev. James Thomson for another year. This ended his regular education, but his father, though of limited early opportunities, was a diligent reader, and not only instructed his son in mathematics, but guided his taste in reading the best English authors, both in prose and poetry. Judge Story relates how the Chief Justice was accustomed to say with affectionate emphasis, "My father was a far abler man than any of his sons. To him I owe the solid foundation of all my own success in life." It is recorded of the Chief Justice that at twelve years of age he had copied the whole of Pope's Essay on Man, and that his early taste was for poetry, of which he not only read but wrote a great deal. Prof. Theophilus Parsons in some Reminiscences of Marshall says that he early showed the sagacity which always distinguished him, for though he wrote a good many verses he never published any of them. The genius of the Chief Justice was certainly not poetic, yet I have no doubt it found nourishment as well as recreation in his early reading in that field, and the pure and classic English of his writings may be justly attributed, in part at

least, to a taste fashioned on those incomparable models. Both in matter and in manner it must be admitted that Pope's *Essay on Man* is very solid food for a boy of twelve.

A little later his attention was given to the more serious study of military matters. He was born, as we have seen, in the year of Braddock's defeat, the French and Indian war was almost within his recollection and must have been the topic of frequent discussion in all his boyhood, and as he grew towards manhood the disputes of the colonies with the mother country and the prophetic feeling of the approaching collision turned his mind in that direction. When the news came that blood had been shed at Lexington he was already lieutenant of a militia company of which his father had been captain, and during the same summer he was appointed lieutenant in a battalion of Minute Men, and saw his first service in the encounter at Great Bridge near Norfolk with the Loyalists under Lord Dunmore. In July, 1776, he was made lieutenant in the Eleventh Virginia Regiment of the Continental Line, became captain in May, 1777, and remained in active service till 1779, having been present at the battles of Brandywine, Germantown, and Monmouth, the assault at Stony Point and at Paulus Hook, as well as through the memorable winter at Valley Forge. In 1779 the number of officers in the Virginia line being found excessive, he was ordered to return to Virginia to await the raising of fresh levies, but these being delayed he resigned. He re-entered the army, however, in October, 1780, on the invasion of Virginia by the British under Arnold, and served through that campaign.

On this occasion, when we are met to commemorate his entrance on judicial office, I must necessarily touch thus briefly his military career, but it would be a mistake

to pass it lightly by as a mere incident of his youth, and doubly so to overlook its effect upon him. It colored his whole future life and opinions. Though his rank was not high he appears to have impressed himself upon his fellow officers not only as a brave and patriotic soldier, but also as a man of clear and impartial mind, with a judgment mature beyond his years. He was often called upon to act as arbiter of private disputes and officially as judge advocate, and earned the affection as well as the respect of officers and men. A fellow officer (Lieutenant Philip Slaughter) who left a record of his experiences, wrote of him, "Marshall was the best tempered man I ever knew. During our sufferings at Valley Forge nothing discouraged, nothing disturbed him. If he had only bread to eat, it was just as well; if only meat, it made no difference. If any of the officers murmured at their deprivations he would shame them by good-natured raillery, or encourage them by his own exuberance of spirits." But the effect of his military experience on the man himself was even more notable. It broadened his ideas, his opinions, his feelings, and fixed indelibly his ardent patriotism. He entered the army a Virginian, he left it an American. He has himself written, "I found myself associated with brave men from different States who were risking life and everything valuable in a common cause believed by all to be most precious, and I was in the habit of considering America as my country, and Congress as my government."

In 1779, as already said, he returned to Virginia, and reported at Williamsburg where the Legislature was then sitting. While waiting for the fresh forces to be raised, he commenced his professional studies with a course of lectures on law by the famous Chancellor Wythe of Will-

iam and Mary College, also attending a course on Natural Philosophy by the learned and accomplished Madison, afterwards Bishop of Virginia. With the short interruption of the campaign of 1780, he continued his studies at Williamsburg, was admitted to the bar in 1781, and returned to his native county of Fauquier.

He rose rapidly into practice and a position of note. He was himself fond of attributing this to the partiality of his former friends and companions-in-arms, and perhaps with some justice, for he knew their sufferings, their necessities, and their wrongs, and he lacked neither courage nor ability to espouse their cause. But we know there were more potent reasons than this for his success. How many of my younger hearers to-day have any adequate realization of the hardships and miseries of that time, of the poverty and distress of the people, the exhaustion and helplessness of the government? The war practically ended with the surrender of Cornwallis at Yorktown in October, 1781, and officers and men began to return to their homes. But peace was not yet, and until peace nothing was settled or secure. A cessation of hostilities in Europe, or a resolute War Minister in England, might at any time see the renewal of the effort to subdue the colonies and all the patriots' exertions and sacrifices must begin again or their cause be finally lost. The men who returned home at the end of their enlistment returned to houses falling into decay, to fences gone and unploughed fields grown rank with weeds, with herds scattered or perished, and desolation and ruin impending on every hand. The Marshall family were well to do among their neighbors, yet a great-granddaughter has told<sup>1</sup> how when John came from the

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<sup>1</sup>8 Green Bag, 480.

army to Fauquier to see his parents, bringing with him some French officers, his companions, his mother made into bread a little wheat flour, the last she had, which had been saved for some such hospitable occasion, and the young children cried for some of the unwonted dainty, so that John first learned of the straits to which his family were reduced. It is added that with characteristic self-denial he avoided eating any of the bread so that the younger children might have some. Every biography of every officer of the time bears witness to the same condition of things—scant food, no supplies, no money. The commissioned officers of the Quartermaster's Department, under so capable and so energetic a Quartermaster General as Nathanael Greene, memorialized Congress that a year's salary in the depreciated currency was scarcely sufficient to buy a suit of clothes, and even that salary was unpaid.

This was the state of affairs when Marshall came to the bar. Virginia was an agricultural State, and the wealth of the people was in their land. The land was in the condition I have already alluded to, and the troubles that arose from neglected and deserted homesteads or encroaching neighbors went inevitably into litigation. Fauquier, moreover, was a frontier county, and "land cases" from overlapping surveys, conflicting boundary lines, dubious titles, and the like, filled the dockets of the courts. To such business Marshall brought special adaptation from his knowledge of the country and the people, his practical familiarity with the questions, his clear and penetrating mind, his untiring industry and the confidence inspired everywhere by his personal character. It was inevitable that he should come rapidly to the front of the bar.

In 1782, at the age of twenty-seven, he was elected by his neighbors in Fauquier to the Legislature, and soon after moved to Richmond. The bar there was one of the most distinguished in the country. It was led by Patrick Henry and Edmund Randolph, and included John Wickham, James Innes, Alexander Campbell and Benjamin Botts, names which have still a national celebrity. Among these Marshall took and held an honorable position, and his practice and reputation continued to increase steadily, notwithstanding the interruptions of his public legislative duties.

He had come now to what we may call the second period of his career, to practical acquaintance with politics and legislation. The problems that confronted him were those which have most keenly tried the knowledge, the wisdom and the courage of statesmen in all ages and in every country — how, without making their burdens unbearable, to procure from a land and a people prostrated and exhausted by years of war, the means of meeting the public obligations, of preserving the public credit, and the maintenance of the government. When the sword is drawn in defense of home and liberty, men stop not to count the cost. Moreover in a brave and energetic people there is always a large and influential party with whom war is for its own sake unfortunately popular. The *gaudium certaminis* itself supplies incentive, and men are apt to throw away even the little effort to look beyond the moment. But when the fight is ended, and the exhausted combatant returns to a wasted homestead and the daily pressure of poverty on his household, then indeed comes the need of a resolute facing of the cost and the consequences. This was the situation and these the serious problems that engaged Marshall's at-



tention from his entrance into political life. I may not stop to dwell on particulars, for I must pass on to even larger questions that were approaching. Suffice it here to say that with two short intermissions caused by his voluntary refusal of re-election, he continued in the Legislature for ten years with constantly increasing reputation, and during part of that time was also member of the Privy Council of the State, elected by the Legislature under the Constitution of 1776, to "assist in the administration of government," a sort of independent cabinet to advise and in some degree control the executive.

The years following the close of the Revolution were full of political doubt and danger and confusion. The condition I have mentioned in Virginia prevailed in all the States. The common peril from the common enemy no longer held them unquestioningly together, and under the pressure of their domestic difficulties they were becoming impatient of even the slight interference of the Central Government. Congress under the Articles of Confederation had no power of compulsion on the States or their citizens. It could not levy taxes, or enforce obedience to its laws. It represented merely a league, not a government, and its feebleness is thus forcibly summed up by Judge Story: "Congress could make contracts, but could not provide means to discharge them. They could pledge the public faith, but they could not redeem it. They could make public treaties, but every State in the Union might disregard them with impunity. They could enter into alliances, but they could not command men or money to give them vigor. They could declare war, but they could not raise troops, and their only resort was to requisitions on the States. In short,

all the powers given by the Confederation which did not execute themselves without external aid were at the mere mercy of the States, and might be trampled upon at pleasure." The pressure of these evils produced the convention which framed the Constitution of the United States, and then came the momentous question of its ratification by the States. It is difficult for us with our experience of its benefits to appreciate the depth and fervor of opposition to it. Yet in all the States there was a party who saw in it the portentous shadow of imperialism, which would ultimately crush and obliterate the States and build on their ruins a central despotism. Nor was the party small in numbers nor insignificant in abilities or patriotism. No man may question the patriotism of Patrick Henry, yet in the Virginia Convention he devoted his fiery eloquence to the opposition and he was ably supported by George Mason, who had been a member of the convention that framed the Constitution, had had great influence in molding its final form, and yet had been so dissatisfied with it that he refused to sign it. On the other side was Edmund Randolph, who like Mason was one of the members who refused to sign the Constitution, but who, though dissatisfied, had become convinced that it was preferable to the evils and dangers under the Confederation. With him was James Madison, a resolute supporter from the first of the Constitution which he too had helped to frame and which he had done so much to make known to the people in that series of papers, unrivaled in the literature of the world for masterly discussion of the principles of government, since known as the *Federalist*. These were the leaders, and their State was the battle ground on which for a time depended the fate of the Union. Virginia was

the most important of all the States. Its population was as large as that of Pennsylvania and New York combined, and included nearly one-fifth of the whole population of the thirteen States. Its geographical position was such that its refusal to enter the Union would have cut the country in two so evenly that it might almost have disputed with Pennsylvania the title of the Keystone State. Parties in it were very equally divided. Marshall was already a Federalist. His military experience, as we have from himself, had accustomed him to look upon the whole country as one, and it had taught him how real and how dangerous were the ills that menaced that country. His clear practical sense saw the weakness of the Confederation and made him thus early an advocate of a government strong enough to protect and maintain itself. His abiding faith in the people's patriotism, constancy and innate love of liberty deprived the spectre of imperialism of its terrors. In the community in which he lived, the opponents of the Constitution, the State-rights party, or Republicans, as they called themselves, were largely in the majority. But his neighbors knew and esteemed John Marshall, and they wanted him as their representative in the convention. But they wanted a pledge that he would vote in accordance with their views. This he refused, and at once entered the canvass with a bold and resolute announcement of his convictions and his action if elected. After a close and earnest contest he was elected. There could be no more convincing illustration of the unflinching courage and integrity of the man, and the weight and influence of his character among the people who knew him. His conduct in the convention was in accordance with his announced views. He ranged himself at once with Madison and Edmund Pendleton,

the eloquent Innes and Henry Lee, as a vigorous and untiring supporter of the Constitution, but so even of temper, so conciliatory of manner, and of such strength and force of argument as to be reckoned among the foremost men on his side. Of his speeches in the convention, time only permits the mention of one, and it is significant of the undercurrent of circumstances that was even then shaping his future career. The judiciary article of the Constitution was one that the opponents regarded with special animosity, as in it they saw the Federal arm reaching across State lines and enforcing the central authority. Marshall's speeches on this article were regarded as the ablest and most convincing presentations of the necessity of a strong and independent judiciary, and it is notable that in them he foreshadowed the great question that was to arise later, of the power of the judiciary to declare an act of Congress unconstitutional. George Mason had argued that the Federal tribunals would absorb the litigation of the country; that the laws of the United States being paramount to the laws of the particular State, there would be no case to which those laws might not be extended. To this Marshall replied that the government of the United States could not go beyond their delegated authority. "If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void." The convention accepted the Constitution by the narrow majority of ten, and not the least of Marshall's services to his country was his part in bringing about that result. The required nine States had adopted the Constitution before Virginia came to a final

vote, and the United States would therefore have started even if that vote had been adverse. But without Virginia it would not have been the Union as our fathers and ourselves have known it, and he would be a bold prophet who even now in the light of all our experience would undertake to say that it would have endured.

The next few years were given to practice with ever increasing reputation. In public matters Marshall continued to be an active Federalist and especially devoted to the defense of Washington's administration. At public meetings at Richmond he debated with the most distinguished opponents the President's Proclamation of Neutrality between England and France, Jay's treaty with England, the treaty-making power of the President and Senate, and the duty of the House of Representatives to make the appropriations necessary to give the treaties effect, and other questions of most serious import, on which the prevailing sentiment of Virginia then was opposed to Washington's policy.

In 1796 he came to Philadelphia to argue the great case of the Virginia debts, *Ware v. Hylton*, 3 Dallas, 199. In 1777 Virginia had passed a sequestration act, authorizing any of its citizens who owed money to British subjects to pay it into the loan office and receive a discharge of his debt. The defendant, being indebted on a bond to plaintiff, paid the amount into the loan office, and after the treaty of peace was sued on the bond in the United States Circuit Court of Virginia, where he pleaded the discharge, and it was held to be a full defense. The case came by appeal to the Supreme Court, then sitting in Philadelphia, and Marshall was pitted against three of

the most eminent lawyers at this bar, William Lewis, Edward Tilghman and Alexander Wilcocks. He defended first the right of Virginia as an independent State, at war against Great Britain, to confiscate debts; secondly, that it had done so by the Act of 1777; and lastly, that the debt, being extinguished by confiscation before the treaty, could not be revived by it. It is noticeable that Federalist as he was he argued the State-rights view even of the third proposition. But he put it upon the ground that article 4 of the Treaty of 1783, "creditors on either side shall meet with no lawful impediment to the recovery of the full value of all *bona fide* debts heretofore contracted," only included debts existing at that date, and here the debt was no longer existing. It had been extinguished under the Virginia act, and, if any remedy existed under the treaty, it must be against the State of Virginia which had received the money. He did not sacrifice his views on the supremacy of national authority in matters of foreign relations, but put his argument on the consistent ground of construction of the treaty. He lost his case, but gained great reputation by the candor and strength of his argument. By it his reputation as a lawyer, which had been chiefly confined to his native State, spread over the whole country.

Since his retirement from the Virginia Legislature he had steadily declined public office. He had refused the Attorney-Generalship of the United States offered to him by Washington on the death of William Bradford, the position of Minister to France, also offered by Washington, and, on the death of James Wilson, the vacant seat on the Supreme Court, offered to him by President Adams. Fortunately his time for this had not yet come. He de-

clined it and Bushrod Washington was appointed. In all his career there is nothing more notable than the fact that every office he ever held was offered to him without seeking, and accepted with reluctance. No man ever took office under prouder circumstances. His genuine preference was for private life and the practice of his profession.

In 1798, however, the state of affairs between the United States and France had become so threatening that he was persuaded by President Adams to accept the special mission to France in the interest of peace, with Charles Cotesworth Pinckney and Elbridge Gerry. The rude and insulting treatment which the envoys received from the French Directory is one of the most painful episodes in our history, but it is redeemed from humiliation by the dignified firmness of our envoys. Marshall wrote the dispatches to his government, and they gave universal satisfaction. "As State papers," says Judge Story, "there are not in the annals of our diplomacy any upon which an American can look back with more pride." On his return he was received with popular enthusiasm. As he approached Philadelphia, where Congress was in session, the city cavalry and a procession of citizens met him at Frankford and escorted him into the city. Congress gave him a public dinner, at which the famous reply of Pinckney was first put into the popular form it has ever since retained.

The envoys having had it hinted to them in no uncertain terms that if they expected to be recognized they must offer a bribe to the Directory, had plainly refused, and on being sneeringly asked by Talleyrand's agent if the Americans were too poor to pay a little money, had replied through Pinckney, "America has millions for defense, but not a cent for tribute."

I doubt if any of my hearers under middle age can fully appreciate the potency of that saying. In their time the United States has been too great and too strong for its standing in the community of nations to be questioned. But in 1798 its position was far different. The sanctity of its flag on the ocean was insolently violated by England in its asserted right of search for seamen, and remonstrances were disregarded almost with contemptuous avowal that what consideration they received was due more to concern about Napoleon than to recognition of our rights. The causes which produced the war of 1812, justly called the second war of independence, were already in active operation. On the other hand the conduct of France was equally contemptuous. The insolence of Genet had led to his recall only under the firm demand of Washington, and the French government, instead of relying on the gratitude of the American people for the assistance of France in the revolution, had demanded aid as a right, and strained almost to the breaking point the forbearance even of the Republicans who sympathized with her. The treatment of our envoys has been already mentioned, and the firmness and dignity of their conduct was approved by all parties. The effect of Pinckney's saying was electrical. It struck the popular heart and became almost a popular war cry. Medals and tokens bearing that legend were struck off in great numbers, and down even to my early days a boy's handful of coppers was apt to contain at least one token that passed current everywhere as a cent, but bearing the words, "Not a cent for tribute, millions for defense." The conduct of Marshall won the approval even of his political opponents. Patrick Henry, one of the most vigorous of them, wrote.



"Tell Marshall I love him because he felt and acted as a Republican, as an American."

In 1799, at the earnest solicitation of Washington, who in view of the expected war with France had again accepted the command of the army, Marshall became candidate for Congress and was elected. His earliest duty in that post was the sad one of announcing the death of Washington, which he did in a short speech of great power and pathos, ending with the resolutions declaring Washington the first in war, first in peace, and first in the hearts of his countrymen.

In 1800, President Adams offered him the post of Secretary of War, but before he could assume office the Secretaryship of State became vacant, and was accepted by Marshall. The ability, firmness and moderation with which he held the United States to a position of neutrality under the difficulties, foreign and domestic, of the situation, commanded the admiration of his contemporaries and completed his reputation as a statesman. In his letter of instructions to Rufus King, our Minister to England, he wrote, "The United States do not hold themselves in any degree responsible to France or to Great Britain for their negotiations with one or the other of those powers, but they are ready to make amicable and reasonable explanations to either. The aggressions, sometimes of one and sometimes of another belligerent power, have forced us to contemplate and prepare for war as a probable event. We have repelled, and we will continue to repel, injuries not doubtful in their nature, and hostilities not to be misunderstood. But this is a situation of necessity, not of choice; it is one in which we are placed, not by our own acts, but by the acts of others, and which

we will change as soon as the conduct of others will permit us to change it."

Marshall continued to fill the office of Secretary of State until the end of the Adams administration in March, 1801, but on the resignation of Chief Justice Ellsworth and the declination of Jay to resume the office, Marshall was appointed and entered upon the duties one hundred years ago to-day.

The Constitution of the United States was the first instance in the history of the world where the whole framework of a national government was rested upon and embodied in a written instrument. Leagues and confederations there had been from the dawn of history, based upon treaties and sanctions of various kinds, but resting finally on voluntary good faith or force, the *ultima ratio regum*. But of governments this was the first. It had no precedent, as it has had no successor that was not a copy. The germ of the system was undoubtedly found in the colonial charters by which powers of government more or less ample were conceded to the settlers of the colonies which by the Revolution had become independent States. The men who framed the Constitution, in common with their associates in public life, were versed in the history and the principles of free government as perhaps no other body has ever been. They had deeply studied the writings of the fathers of political thought from Aristotle, through Macchiavelli, and Milton and Locke, down to Montesquieu. One of their contemporaries had but a few years before penned a declaration of the rights of man in terms of imperishable force and beauty.

The Constitution, though it had no precedent, was

framed on the principles of English liberty by men who knew them, both in theory and in practice. They had studied English history and English law, and they worked in the light of both. Blackstone's first volume was published in 1765, and Edmund Burke has recorded that a leading London publisher had sold more copies in the colonies than in England. The common law of England is the most nearly perfect system of remedial justice between man and man, and of effectual safeguards of liberty with order, between sovereign and subject, that the world has ever seen. And its noblest and most legitimate daughter is the Constitution of the United States. The feature of the Constitution which is, or was, its novelty, as well as its crowning excellence, is the clear line it drew between the different functions and powers of government. The wonder and despair of foreign jurists to understand is the complicated but perfectly adjusted balance in the division of powers between the Federal Government and the States, the *imperium in imperio* which leaves to each State the general regulation of domestic affairs touching its citizens in their daily life, yet vests in the United States such direct contact and control as replace the weakness of the Confederation and substitute powers of self-protection, brought home to the people in their individual capacity so that they are made to feel that the Union is as much their government as is that of the State in which they live, and yet without any thought of clash of jurisdiction. Familiar to us as a tale that is told, we are apt to forget the perfection of the unprecedented achievement, the knowledge and discrimination with which the separation was conceived in theory, and the clear and abiding judgment with which the lines of demarcation were laid down in practice. The latter was largely the work of John Marshall.

The distinction between the powers of government, as legislative, executive, and judicial, was evolved in practice from the long struggles of English liberty, and came to us as an inheritance. It was put into philosophic form by the brilliant Montesquieu from his admiring contemplation of English history. But it was never before so clearly and firmly drawn as in the Constitution. England made her judges personally and politically independent, but the Constitution of the United States first made the judiciary as a department of the government not only independent, but equal, and, therefore, supreme within its own province.

The conception of a judicial department was a logical necessity of the scheme of government which the convention had projected. Without it many of the most serious defects of the Confederation would still remain. But the form which it should receive was the subject of anxious thought and much difference of opinion. The most imminent danger to be guarded against was from the States, any one of which might at any time pass a law contrary to the Constitution. How should such a law be rendered harmless? It was proposed that Congress should have a veto upon the laws enacted by the States. But it was at once foreseen that the exercise of this veto would be subject to political influences and passions, and would lead to a direct and open conflict between Congress and the State Legislature. Another plan was to establish a council of revision, to be composed partly of the executive and partly of the Federal judiciary, to whom this veto power should be intrusted. This plan was analogous to the system with which the people were already familiar. In Pennsylvania and most if not all of the other colonies having popular legislative assem-

blies, the Crown, acting through the Judicial Committee of the Privy Council, exercised the power of annulling or refusing assent to the acts of such assemblies. But this power, though admitted and unquestionable by the colonies, led to protracted disputes. There is no more interesting and instructive chapter in Pennsylvania history than the persistent, unrelenting and ingenious efforts of the Assembly to have its own way by the re-enactment, often in forms only colorably varied, of statutes set aside by the Privy Council. Such a conflict between a State and Congress was full of foreboding of peril.

But the danger of departure from the Constitution was not alone to be apprehended from the States. The executive vested in a single head might usurp powers beyond even its ample constitutional authority. Out of such usurpation had come the dictators, the kings and emperors of the past. And again Congress was not to be left altogether without restraint. The legislative branch, which holds the Nation's purse, is always the most powerful in a free government. The colonists had fought George the Third, but the Convention did not forget that his Parliament was as tyrannical as the king.

Out of all these most serious considerations came finally the establishment of a single Supreme Court with jurisdiction over all questions arising under the Constitution and laws of the United States. The honor of having proposed the plan which was substantially adopted belongs to William Paterson of New Jersey, afterwards a justice of the court he was thus instrumental in creating.

The court thus established, though the logical and perhaps inevitable outcome of the traditions, the ideas and the circumstances of the men who made it, was nevertheless a bold and unprecedented conception. For

the first time in history a co-ordinate branch of a sovereign government, it was yet the weakest branch. More independent, less directly responsible either to the other departments or to the people at large, yet holding neither the purse nor the sword, its authority depends wholly upon reason. But how transcendent is its authority, to mark the limits of legislative and executive power; to administer the law and give commands not only to individuals, but to Presidents and Congresses; to sit in judgment on the proceedings and privileges of sovereign States; and to give final form and effect to the great charter of the Union, on which the rights, the peace, the harmony, the prosperity, safety and honor of the whole country depend. Well did De Tocqueville say, "a more imposing judicial power was never constituted by any people. The Supreme Court is placed at the head of all known tribunals, both by the nature of its rights, and the class of justiciable parties which it controls." It was a conception worthy of a free people, and possible only to a people convinced beyond all doubt or hesitation that lasting and orderly liberty can exist only in complete subordination to law. "None but a law-fearing people," says Prof. Dicey, "will be inclined to regard the decision of a suit as equivalent to the enactment of a law. The main reason why the United States has carried out the Federal system with unqualified success is that the people of the Union are more thoroughly imbued with legal ideas than any other existing nation."

Into this great tribunal as its chief, one hundred years ago to-day, came John Marshall, henceforth forever to be identified with it as the embodiment and greatest exponent of its judicial thought.

The justices of the Supreme Court need to be jurists in the wide sense of that term as distinguished from mere lawyers, however learned, and they, especially the Chief Justice, should be statesmen with a broad appreciation of the bearing of even technical questions of law, upon the fundamental principles of government, the polity and the course of events in the country. Let us look for a moment at Marshall's wide and varied, though unconscious, training for such place. *Nihil simul inventum est et perfectum*, in the quaint expression and always interesting aphorisms of Coke. Even the powers of John Marshall did not spring like Minerva, full grown, from the brain of Jove, but year after year, like the tree that is planted in fertile ground, grew to maturity alike through sunshine and storm. His substantial military service in his youth had matured and sharpened his perceptions, his energies, his resolution, the practical faculties of life; his service of years in the Virginia Legislature had made him familiar with public questions of government and policy, and later he had studied legislative matters in the broader field of Congress; as a member of the Virginia State Council he had learned to consider methods of administration as well as of legislation, and this experience was again widened in the National Cabinet as Secretary of State; and his service as Envoy to France had shown him the devious ways of diplomacy. But where in all this busy life did he find time for the learning and knowledge of the law? His training even in the routine of litigation was not inconsiderable. He was by choice and desire a lawyer, he maintained his position at the bar uninterruptedly as far as compatible with the full performance of his public duties, and he returned to practice promptly at every opportunity. That he was profoundly

versed in legal principles is manifest in every page that he ever wrote. He worked on them and from them always. But if we speak of technical knowledge of cases and precedents, and the law as laid down by the voice of authority, let us say frankly he has been surpassed by many others. He had not the learning of Kent, or of our own Tilghman, or of his most learned successor, Taney. But he had that which for his time and place served him far better, the lawyer's instinctive perception, an unerring logic in reasoning, and a vigor of intellect that went *per saltum* where others had to climb laboriously through the maze of decisions. It is related of him by high authority that not unfrequently at the end of a long and close argument on some intricate and knotty question, listened to with most exemplary patience, he would turn cheerfully to his younger colleague and say, "Well, Story, the law is so and so — look up the authorities and see if it isn't." And that learned and accomplished book-lawyer always found that the Chief Justice was right. No man of equal eminence ever owed less to teaching and to what is usually called education. But no man ever had his natural powers more perfectly developed by experience in the school of life, leading up to his crowning work. Fortunately the questions with which he had to deal required less book-learning than wide grasp of principles. The Constitution is expressed with remarkable compactness in general terms, and it has been well said that it is "an enumeration of powers, not a definition of them." The definition of them was to be the work of Marshall and the court. When at the age of forty-five he took his seat upon the bench, little did he or his contemporaries anticipate that his distinguished public career of a quarter of a century was to be\



so completely overshadowed that it requires the special study of this occasion to recall its extent, its variety and its eminent usefulness.

In 1801, so little had the importance of the position been perceived that the learned, accomplished and patriotic Jay thought himself going to rust in the Chief Justiceship, preferred to be Governor of New York, and finally resigned to go as envoy to England. The court has as yet made but little impression on the jurisprudence of the country. The powers and limitations of the Constitution had been discussed, often with partisan heat and violence, in legislatures and conventions, but no principles of construction had been judicially settled, and the decision of the Supreme Court in the only important case that had yet come before it, *Chisholm v. State of Georgia*, 2 Dall. 419, in which it was held that a State might be made defendant in the Federal courts at the suit of an individual, had not only roused the wrath of the State-rights party, but so startled even the Federalists, that it led to an amendment of the Constitution. But questions were already looming up, full of ominous import, which could not be long delayed; questions of the inherent powers of the States as sovereignties, how far they had been surrendered to the central government, how far they had been retained, how far they were exclusive in one or the other or might be exercised concurrently; questions of the obligation of contracts, including chartered rights and their protection by the Federal courts from impairment by the States; questions of the regulation of commerce and the navigation of rivers between States and with foreign countries, as against State laws; questions of the restraints upon the issue of money by

the States, and of taxation by the States of Federal offices, or corporations; questions of jurisdiction between State and Federal courts, including the control of State courts over Federal officers, and the revision by the Federal courts of the decisions of State courts on constitutional questions. And underlying all these was the fundamental question on which the solution of all of them was largely to depend, the strict or the liberal construction of the Constitution as an entire instrument. None of these questions had been decided and there were no precedents to guide the decision. The science of constitutional law, as now known to us, had as yet no existence. Under the institutions first inherited from the mother country, and then made the models on which our own were reconstructed, lawyers and judges had been trained to view the legislative power vested in Parliament as infallible and omnipotent. That first lesson had to be unlearned, and a new field of jurisprudence opened.

Into this untrodden field the new Chief Justice entered with the firm step of conscious strength, trusting to his own clear perceptions and honest singleness of purpose to find the way. And how plain and broad and straight the way seems when he has once pointed it out.

Let me take one general illustration, the great question which as I have said underlies all the others, that of the strict or liberal construction of the Constitution as an entire instrument. It had been the subject of earnest, sincere and settled difference of opinion among some of the wisest statesmen of the day, and perhaps even more frequently of partisan and violent dispute. It may be said that it exists yet and will always exist, for it is inherent in the nature of the subject, the imperfection of language, and the varying temperaments of those who

interpret it. In statutes, in private contracts, and most of all in wills, it is part of the lawyer's daily work to ask, Shall we adhere to the letter, or shall we look beyond it for the intent? The States, said the strict constructionists, the State-rights party, are independent sovereignties, the source of all political power; for certain expressed purposes they have transferred limited portions of that power to the Union, but in so doing they have only appointed an agent, and such agent has no power not literally within the terms of his appointment; if authority is not shown in express words, it does not exist. The United States, said the Federalists on the other side, is not a mere league, but a government; with delegated and limited powers it is true, but nevertheless a government, and possessed of all powers inherent in the conception of a government, unless expressly withheld or prohibited in the instrument creating it. The Chief Justice took up the question in the very essence of judicial spirit. In politics he had been a life-long Federalist, and the champion of their views in many hard-fought contests. But as a judge he saw only with the clear light of the law. The Constitution, he said, was to have neither a liberal nor a strict construction, but a natural one, according to the intention as shown by the words understood in their natural and usual meaning. The Union was a government of delegated powers. Therefore, when any power was claimed, the warrant for it should be clearly shown in the Constitution, and to that extent the construction must be strict. But though only of delegated powers, it was nevertheless a government, and must possess the full measure of all the powers intended to be given. Therefore the construction must be liberal as to every means of exercising the powers given

with full effect. How plain and how easy the solution seems when once it is said. Do not even my unprofessional hearers see what plain common sense it is? A platitude that even the incipient law student could answer off-hand. But when John Marshall first said it, it was new, and it is a platitude to-day because he said it in such terms that no man could fail to see its solid good sense, the foundation of all permanent law.

In this spirit the Chief Justice took up the varied questions as they arose, and discussed and decided them. Time and the limitations of a spoken address do not permit even a bare enumeration of the cases as they arose, or the points they involve; but speaking to-day as a lawyer to lawyers, I may make brief reference by way of illustration only to a few of them.

*Marbury v. Madison*, 1 Cranch, 137, was the first and in some respects the most important of the cases I shall mention. *Marbury* was appointed a justice of the peace in the District of Columbia by President Adams, was confirmed by the Senate, his commission signed by the President and passed under the seal of the State Department, but before it was delivered the administration changed, and, under instructions from President Jefferson, Secretary Madison refused to deliver it. The suit was for a *mandamus* to compel delivery. The court held that it had no original jurisdiction except that fixed by the Constitution, and that the Act of Congress giving it jurisdiction in such cases was to that extent void. The case is notable in that holding that it had no jurisdiction to issue such a writ, the court's opinion on *Marbury's* title to the office, and the power of the judiciary to compel the performance of duty by executive officers, was *obiter*. But

the Chief Justice, stating that the novelty and delicacy of some of the questions required a complete exposition of the principles on which the opinion of the court was founded, entered into the subject at large, and vindicated the power of the court to declare an Act of Congress void for unconstitutionality. This point had been decided more or less explicitly before. Indeed, it was a necessary conclusion from the equality of the judiciary as a co-ordinate branch of the government. But it encountered very resolute and even passionate political resistance, both from the legislative and the executive branches, had been touched tenderly and with reluctance, even by Marshall himself in the debates on the Constitution, and had never commanded general acquiescence, nor received an authoritative exposition.<sup>1</sup>

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<sup>1</sup> For the following very complete note of the prior cases I am indebted to Ardemus Stewart, Esq., of the Philadelphia Bar. *Comm. v. Caton*, 4 Call, 5 (Va., 1783); *Cases of the Judges of the Court of Appeals*, 4 Call, 185 (Va., 1788); *Trevett v. Weedon* (R. L., 1786), *Arnold's Hist. of R. L.*, vol. 2, ch. 24, and see *Cooley's Constitutional Limitations*, 193, n. 8; *Den on Demise of Bayard v. Singleton*, 1 Martin, 48 (N. C., 1787); *Ogden v. Witherspoon*, 3 Hayward, 237 (N. C., 1799); *Bowman v. Middleton*, 1 Bay, 253 (S. C., 1792); *Austin's Lessee v. Trustees, etc.* (Pa., 1793), referred to in *Emerick v. Harris*, 1 Binney, 416; case of *Holmes and Walton*, and *Taylor v. Reading*, in New Jersey, cited by Kirkpatrick, C. J., in *State v. Parkhurst*, 4 Halsted (9 N. J. Law), 427; *Van Horne v. Dorrance*, 2 Dall. 804 (1795).

On April 5, 1792, the Circuit Court for the District of New York, consisting of Chief Justice Jay, Justice Cushing, and Duane, District Judge, declared it as their unanimous opinion that the pension law passed by Congress on March 23, 1792, was invalid, because it attempted to assign to the judicial department duties which were not judicial; on June 8, 1792, the Circuit Court for the District of North Carolina made a similar declaration in a joint letter, addressed to the President of the United States; and on April 18, 1792, the Circuit Court for the District of Pennsylvania addressed a similar joint

The court, however, went a step farther and asserted the duty and power of the judiciary to compel obedience to the law in all matters not political or discretionary, even by the highest executive officers. This decision was of transcendent importance in establishing the principles on which all our present views of constitutional law rest. It settled once for all that the Constitution had created a government of law, and it established the authority of the court on a footing never since shaken, as the final interpreter of the Constitution and the supreme tribunal for the settlement of all matters, even though touching the other departments, that are judicial in their nature.

In *United States v. Peters*, 5 Cranch, 115, a conflict of jurisdiction had arisen between the Pennsylvania and the Federal courts of admiralty over a question of prize, and Judge Peters had been reluctant to enforce a judgment which might bring on a collision. But the Supreme Court without hesitation laid down the rule of the supe-

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letter to the President. Somewhat later in the same year the Supreme Court of the United States, in *Hayburn's Case* (1793), 3 Dall. 409, refused to carry the act into effect.

In *Emerick v. Harris* (1808), 1 Bin. (Pa.) 416, the right of the courts to pass upon the constitutionality of an act of the Legislature was asserted, though the act in question was held to be constitutional. Mr. Justice Yeates stated that *Marbury v. Madison* was not published until after his opinion had been prepared.

The constitutionality of statutes had been argued without expressly stating the power of the court to declare them void, if unconstitutional, in several other cases, *a. g.*, *Hylton v. United States* (1796), 3 Dall. (U. S.) 171, where the statute was held constitutional, and *Respublica v. Cobbett* (1798); *Respublica v. Duguet* (1799), and *Respublica v. Franklin* (1802), unreported cases in the Supreme Court of Pennsylvania, cited by Mr. Justice Yeates in his opinion in *Emerick v. Harris* (1808), 1 Bin. (Pa.) 416, 422.

rior authority of the Federal courts and the total invalidity of State statutes interfering with it.

In *Fletcher v. Peck*, 6 Cranch, 87, the clause of the Constitution prohibiting the States from the passage of any law impairing the obligation of contracts was construed and applied to grants of land by a State. In *The State of New Jersey v. Wilson*, 7 Cranch, 164, the same clause was held to prevent a State taxing lands which had been purchased by the colony under convention with the Indians, with an agreement that they should not be taxed thereafter. And in *Trustees of Dartmouth College v. Woodward*, 4 Wheaton, 518, the same clause received a masterly and final exposition and extension to the protection of the charter of a private corporation. This is perhaps the most noted of all Marshall's decisions, on account of the wide public interest it excited, its far-reaching consequences, and the eminence of the counsel on both sides, including Joseph Hopkinson, Daniel Webster and William Wirt.

In *Sturges v. Crowninshield*, 4 Wheaton, 122, the impairment of the obligation of contracts was further considered in connection with the authority of the States to pass insolvency and bankruptcy acts not in conflict with a national bankruptcy law.

*McCulloch v. State of Maryland*, 4 Wheaton, 316, was a case of great importance. Congress had chartered the Bank of the United States, and a branch having been established in Baltimore, the State of Maryland levied a tax upon it, which the bank refused to pay. The State courts gave judgment against the bank, but the Supreme Court reversed it. The opinion of the Chief Justice was a masterly exposition of the liberal construction of powers granted. He held that the United States possesses

authority to employ all means appropriate and convenient as well as those absolutely necessary for the full exercise of powers specifically granted to Congress by the Constitution; that a bank was a legitimate instrument of the financial power; that the States cannot burden or impede the exercise of the Federal powers by interference with their instruments, and that as the power to tax implies the power to burden to the extent of destruction, the States cannot tax any of the Federal instrumentalities. In the course of his opinion the Chief Justice said: "The government of the Union is a government of the people. In form and substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them and for their benefit"—the same thought which was put into lasting popular form in Lincoln's expression, "Government of the people, by the people, and for the people."

Time does not permit further details, but even from these illustrations it will be perceived how serious the questions were, how deeply they reached into the very foundations of government, and how materially and permanently they affected all constitutional questions that were to come. It is true that Marshall had a clear field. He had no light from precedents, but he had no obstructions from them. As a matter of mere legal construction he might have decided many questions differently, and no lawyer then or since could have said with confidence that he was wrong. But he had one steadfast guide through all the conflicting claims and theories, the firm conviction that the Union under the Constitution was a National government, and that as a weak government could not conduce to orderly and lasting liberty, the United States, as a government, must possess powers ade-



quate to protect and preserve itself. In 1834 the Legislature of South Carolina, under the express sanction of the Nullification Convention of 1832, had prescribed a test oath for its militia officers, and the question of its constitutionality came before the Court of Appeals in the case of *State ex rel. McCready v. Hunt*, 2 Hill (S. C.), 1. The majority of the court held the oath unconstitutional, Harper, J., dissenting. In a private letter to one of the distinguished counsel in the case, Thomas S. Grimke, acknowledging the receipt of a copy of the opinions, the Chief Justice wrote: "Judges Johnson and O'Neill appear to have decided the question on the Constitution of the State; Judge Harper takes into view the Constitution of the United States. His opinion unquestionably displays talent and acute reasoning powers, but is obviously founded on the assumption that our Constitution is essentially a LEAGUE and not a GOVERNMENT."<sup>1</sup>

"This is the true and substantial dividing line between parties in the United States. One of more vital importance cannot be drawn. As the one opinion or the other prevails will the Union, as I firmly believe, be preserved or dissolved. If a mere league has never been of long duration, if it has never been of sufficient efficacy to preserve a lasting peace between its members, we must be irrationally sanguine to indulge a hope that ours will furnish an exception to any and every thing which has heretofore occurred in the history of man. If such be the true spirit of the instrument such must be its construction, but we cannot, I think, fail to ask ourselves for what purpose was it made? Was it worth the effort of all the wisdom, virtue and patriotism of the country merely to exchange one league for another? Did the convention —

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<sup>1</sup> The capitals are the Chief Justice's.

did the people — believe that they were framing a league and not a government?"

The underlying principle on which the permanence of the Union under the Constitution must depend came, it is true, to the final arbitrament of the sword. But the conflict, perhaps inevitable, came in the fullness of time with a North grown superior in numbers and resources, and a great West as a controlling factor, and was fought out on that side by three generations of men grown up in profound belief and reverence for the supremacy of the national government as declared by Marshall. And when slavery, the exciting cause of contention, was ended in the only way that Marshall thought it could be, by a great social convulsion or civil war, the Constitution and the Union, as he expounded them, resumed their hold on the affections of a united nation.

How important was a right start, and how much we owe to the firm hand that carried the Constitution through its formative period of trial and experiment, we may see by a glance at the consequences of a different line of decision. Let me take a single illustration. A hundred years ago this active, ingenious, energetic, tireless people found themselves in possession of a vast and fertile continent whose original inhabitants were so few, so scattered, so inferior, so heathen, that their rights need not be regarded — a view, let us say with humility, if not with shame, that the race has not yet lost on either side of the ocean. The boundless opportunities that were to open to the near future were then but dimly if at all foreseen. The "west" began at Pittsburg, which was remoter from Philadelphia in time, and infinitely so in accessibility, than San Francisco is to-day, and the "far west" ended with the French settlements on the banks

of the Mississippi. Three years were yet to elapse before the heroic expedition of Lewis and Clark was to set out to explore whither the great wilderness of the west would lead. Railroads were not yet, and steamboats were but among the experiments of Philadelphia's inventors. In this condition of things the State of New York granted to Livingston and Fulton an exclusive right of navigation of the waters of the State with vessels moved by fire or steam, and a few years later this right was sustained by the highest courts of New York by an injunction against the owner of a steamboat plying between the city of New York and Elizabethtown, with a license under the navigation act of Congress of 1793. The case under the name of *Gibbons v. Ogden*, 9 Wheaton, 1, came by appeal to the Supreme Court, and the decision was reversed. The Chief Justice, in one of the greatest of his opinions, vindicated the supremacy of Congress on all questions of the regulation of commerce and laid down the canon of construction by which the commerce clause of the Constitution has been read from that day to this. Consider for a moment the effect had the court taken the other view and sustained the New York decision. If every ferry-boat that crossed the North River could do so only under license from New York or the grantees of her monopoly, if every boat-load of lumber or of coal from the Allegheny and the Monongahela had had to run the blockade of license and pilotage fees and commercial regulations of every State between the line of Pennsylvania and the Gulf of Mexico, how long would the spirit of our people have endured such shackles to free movement? The wonderful development of mechanical invention and the steady sweep of material progress would have soon burst the bonds of

such narrow construction, and he would be a bold man to say that in the breaking of the court's construction the authority of the court and even the Constitution itself, not yet matured and settled in the confidence of the nation, might not have been destroyed by constant change or open and flagrant violation.

It would be too much to claim that even the broad foresight of Marshall had measured the force of the under current of development leading to the unprecedented career that lay before his country. But he knew his countrymen, their history and their institutions. He knew that the spirit of the people was fast molding a harmonious and homogeneous nation, which must be bound together by a national constitution. And he labored in the spirit of a patriot, a statesman, and, above all, a far-seeing judge, to make the bond strong enough to endure inevitable strains, yet elastic enough not to break with expanding empire. To be thus man of practical affairs for his own day, yet prophet in his foresight for the years to come, what higher summit could there be in the achievements of human judgment, patriotism and wisdom?

In the four and thirty years that he sat in judgment the court made fifty-one decisions on constitutional questions, and the Chief Justice wrote thirty-four of them. In only one did the majority of the court fail to agree with him. In *Ogden v. Saunders*, 12 Wheaton, 213, the construction of the bankruptcy clause in the Constitution arose with respect to the exclusion of State legislation on the subject. Three judges, including Marshall, thought the power of Congress exclusive, but the majority held that the States might legislate on the subject except where the power is actually exercised by Congress and the State

laws conflict with the law of Congress. In the three-quarters of a century that have elapsed since then we have had bankruptcy acts passed and repealed by Congress, insolvency laws of every variety of scope and effect passed and repealed and passed again by State legislatures, and the subject cannot be said to be settled yet. In the light of all this additional experience the best lawyers of to-day are far from sure that the opinion of the Chief Justice was not the wisest and most correct.

In speaking of Marshall we do not forget that he had learned and able colleagues, and was aided by an exceptionally brilliant and able bar. But he was easily the master of them all, and by the pure force of reason, especially on constitutional questions, he dominated the court with the free consent and admission of his brethren. In 1811 President Madison appointed Joseph Story to the Supreme Court for the undisguised purpose of neutralizing the influence of Marshall. Story was young, aggressive, and, as Josiah Quincy says, "a bitter Democrat in those days." But he came under the influence of Marshall, and, like the others, he soon yielded to the weight of superior intellect and force of character. He became an affectionate and admiring disciple, and the friendship lasted throughout his life — a friendship highly honorable to both men; to Story that he had the breadth and largeness of mind to become and confess himself a convert; to Marshall that he could make of such an antagonist an admiring follower.

More than half a century ago Henry Brougham said that no judge could afford to be often wrong, and the time had gone by when any court could rest long on mere authority. It must justify itself by its reasons. No tribunal was ever more dependent on this principle than the

Supreme Court of the United States, and no judge ever sustained the burden with more unfailing strength than Chief Justice Marshall. He brought to the judicial office, as we have seen, a profound knowledge of the history and institutions of his country, a political sagacity trained by long and varied experience in the legislative and administrative departments of the government, a firm and comprehensive grasp of the fundamental principles of law, and, above all, an unswerving fidelity to the highest conceptions of judicial duty. Through all the intricacies of conflicting evidence or discordant principles his intuitive perceptions saw the connection between premises and conclusion, and with an unrivaled grasp of every phase and bearing of the subject his vigorous and unerring logic marked out the path with such cogent and convincing reasons as to meet the criticism of opposing views, and still more to stand the test of the future in the development of corollaries and consequences. His intellectual integrity and courage took him straight to his conclusion, turning his eye neither to the right nor left for irrelevant objects by the way.

It is related of the great literary autocrat of the eighteenth century that he said of a future Lord Chancellor: "I like Ned Thurlow; he lays his mind fairly against yours and never flinches." If Dr. Johnson had known John Marshall, he would have liked him for the same reason. He never flinched. He never underestimated or understated the strength of his opponent's position, or the difficulties of his own. He laid his reason bare for all men to see and to challenge, and those who would not be convinced against their will were at least silenced by their inability to refute him. Even the caustic and unfriendly John Randolph said: "I know John Marshall's

opinion is wrong, but there is no man in the country who can take it up and show how it is wrong."

In this country the prominence and importance of Marshall's opinions on constitutional questions have absorbed our attention. But abroad, outside of special students of American institutions, such as Bryce and Sir Henry Maine, his reputation rests largely on his judgments in admiralty and international law. In these he ranks with Lord Stowell. The breadth of his views was prophetic. He held that the English doctrine limiting the admiralty jurisdiction to tide waters could not properly be applied to our great rivers, but that the test should be navigability from the sea. And he was among the earliest to recognize that our great lakes were inland seas and the law should so treat them.

The opinions of Marshall are models of judicial style. No legal writings were ever freer from technicalities of language or thought. In plain words which reach even the unlearned understanding, without ornament, and absolutely devoid of flourish or by-play or looking to side effects of any kind, they present a calm and steady flow of pure and sustained reason from postulate to conclusion. And they read to the lawyers of to-day as they read to the lawyers in the cases they decided, for the argument has no trace of personal, or party, or temporary considerations. Though his individual convictions were deep and strenuous and the contests of his time were fierce and unsparing, his personality no more appears than the personality of Shakespeare in Hamlet or Macbeth. He wrote as Shakespeare wrote, not in the taste or fashion of his age, but on the foundations of human wisdom in the light of pure and enduring reason. And he wrote as Thucydides wrote, not for a day, but as a possession for all time.

From Marshall's assumption of the Chief Justiceship his life is necessarily identified with his judicial career. But at least a passing mention must be made of two or three incidental matters.

On the death of Washington his papers passed into the possession of his favorite nephew, Judge Bushrod Washington, at whose urgent solicitation Marshall undertook the writing of his life. It was a great labor, performed in the midst of exacting judicial duties. It is in reality a history, and indeed the first volume was revised and issued separately as a school history of the United States. It was, however, laid out on too large a plan as a biography, and the result is somewhat cumbersome. But it is a storehouse of information, clear and authoritative narration, and sound judgment on men and affairs at the birth and early days of the republic.

In 1807 occurred the first and in many respects the greatest of what may be called our State trials, that of Aaron Burr, for treason, before the Chief Justice at Richmond. The circumstances are familiar and I need not recount them. But I make this passing mention of the trial as it shows by a shining example the impartiality and fearlessness of Marshall. Burr was detested by the Federalists as a leading and violent Republican, and there was added to this political antagonism a personal animosity against him as the slayer of the beloved Hamilton. On the other hand his treacherous effort to supplant Jefferson in the choice for the Presidency, when the accident of the vote in the electoral college under the first system provided in the Constitution gave him an apparent but wholly unintended opportunity, had drawn upon him the vindictive wrath of his own party. Jefferson was President, and the whole energies and influence of



the unparalleled rancor of the political and personal passions of that time can read the trial of Aaron Burr without feeling that the calm and impartial serenity with which the Chief Justice held in check the violence of both prosecution and defense had behind it a firmness of temper which even the representative of the government could not venture to encounter.

His domestic affections were warm and enduring. At an early age he married a charming girl, for she was but little past fifteen, and they lived together in unchanging affection for nearly fifty years. Her loss he never ceased to regret, and during the three years between her death and his own, it is said he never omitted to visit her grave at least once a week.

His most striking quality in private life was the unaffected simplicity of his character and manners, the lack of all vanity or affectation, or assumption of superiority.

In some reminiscences of him furnished to the *Louisiana Law Journal*, by a contemporary, Mr. Gustavus Schmidt, afterwards a distinguished member of the New Orleans Bar, I find the following just and graphic description:

"In ordinary life the conduct of Mr. Marshall was affable and polite, and when entering the court-room, which was usually before the appointed hour, for he was extremely punctual in the discharge of his duties, his conversation was cheerful, and evinced a remarkable freedom of mind, which in men of eminent attainments in any particular science is almost an invariable criterion of superiority of intellect.

"In his colloquies on such occasions with the members of the bar, which were frequent, no attempt was ever made to claim superiority, either on account of his age or his great acquirements; neither was there any effort to

acquire popularity; but his conduct was evidently dictated by a benevolent interest in the ordinary affairs of life, and a relish for social intercourse. The moment, however, he took his seat on the bench, his character assumed a striking change. He still continued the same kind and benevolent being as before; but instead of the gay and cheerful expression which distinguished the features while engaged in social conversation, his brow assumed a thoughtfulness and an air of gravity and reflection which invested his whole appearance with a certain indefinable dignity, which bore, however, not the slightest resemblance to sternness. The impression made on the beholder was that of a man engaged in some highly important and grave deliberation, which he apparently pursued with pleasure, but which at the same time seemed to absorb his whole attention and require the full exercise of his faculties."

That he had a just confidence in his own powers is manifest in the direct and straightforward way in which he grappled with the most difficult problems that came before him. But it was a confidence free from all vanity and conceit. The Hon. Charles Augustus Murray, grandson of Lord Dunmore, the last Royal Governor of Virginia, wrote of his travels in America, and, speaking admiringly of Chief Justice Marshall, said that the only indication of vanity he showed was the hospitable one of being able to give his guests the best glass of Madeira in Virginia. His great-granddaughter has told us that he brought the wine from France in 1798, and it was carefully preserved in the family for use at weddings and special occasions. And it adds a touch of pathos to the memory of the kindly and hospitable patriot, that thirty years after his death some of his wine was sold to re-

pair the fortunes of his descendants who had suffered by the unsparing hardships of civil war. "And so," writes his great-granddaughter, "it came by the fortunes of war that I drank my great-grandfather's wine in a stranger's house."

In this connection there is another anecdote of pleasant interest. The Hon. Josiah Quincy, when a young man, accompanied Judge Story to Washington, and in his "Figures of the Past" relates that the judges of the Supreme Court usually dined together, and their custom was to allow themselves wine only when it was raining. But "the Chief," said Story, "was brought up on Federalism and Madeira," and occasionally even on a sunshiny day would say, "Brother Story, will you step to the window and see if there are signs of rain?" Story would be obliged reluctantly to report that he saw none, whereupon the Chief Justice would say cheerfully, with a gleam of humor in his piercing eyes, "Well, this is a very large territory over which we have jurisdiction and I feel sure it is raining in some part of it. I think we may have a bottle to-day."

In person he was plain, and, it is said, without advantages of appearance, voice, attitude or manner. He was very tall and thin, and careless though not untidy in his dress. Josiah Quincy says that he was plain and almost rustic in appearance, and might easily be taken for "an ordinary political judge" until you encountered his brilliant eyes. In his youth he was active and athletic, and he remained in vigorous good health almost until the last. Mr. Binney relates that in 1775, as a youth of nineteen, Marshall walked ten miles to the militia muster, and back again in the evening, having in the meantime drilled his company and afterwards addressed them on

the issues of the impending revolution. In 1832, when seventy-seven years of age, he wrote his son that he walked daily two miles to the court and back again to dinner. He never failed, when at home, to attend the meetings of the Richmond quoit club, of which he was an honored and always welcome member, and it is related that when an old man he could still throw a three-pound quoit to a fifty-foot hub with almost unerring accuracy. I do not know how much my younger hearers, particularly those of city birth, in these days of tennis and golf may know of that time-honored and classic game, but even down to my day it was almost the only out-door game in which grown men indulged. I have played more than once with the late Chief Justice Sharswood, and have seen him triumph in a successful "ringer" with the zest of a boy.

There are many portraits of the Chief Justice, but most of them by inferior artists who failed wholly to catch or portray the spirit and character of the man. The profile by St. Memin, being taken with the physionotrace, is of course mechanically accurate, and St. Memin being an artist of ability has given us an interesting and valuable likeness by which to test the others. But being in profile we miss the alert and beaming eye which was the noticeable feature of the face. The standard and only satisfactory likeness is the one painted by Henry Inman for the Philadelphia Bar, which now hangs in the library of the Law Association of this city. It gives us the mature man, with all the qualities that his contemporaries ascribe to him — the thin, rather small face, the broad brow with a mass of dark hair growing low down on it, the benignant half smile, and the keen but kindly black

eyes that William Wirt said "possess an irradiating spirit which proclaims the imperial powers of the mind within." The full-length portrait by Chester Harding now in the Boston Athenæum gives a good representation of the tall, thin figure and the general outlines of the face, but the eyes wholly fail to indicate the "irradiating spirit." In this respect the portrait is little better than the many silhouettes that show, both sitting and standing, the long, thin limbs, the round head and small features which made up his general appearance. The eye was the electric lamp that lighted up the whole countenance, and without it the features failed to reveal the vital spirit of the man.<sup>1</sup>

Philadelphia has special claims upon this celebration, for outside of his own home at Richmond, nowhere was he so known and beloved in his life-time, or more honored since, than here.

It was in Philadelphia in 1796 that he argued the great case of *Ware v. Hylton*, which first established his national fame as a lawyer; here, in 1798, on his return from the mission to France, he was received as in a triumphal march by the military and the citizens who went out to Frankford to meet him, and by Congress, who gave a

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<sup>1</sup>Since this address was delivered I have had the opportunity of seeing in the Green Bag for February a reproduction of a portrait by John Wesley Jarvis which is interesting as presenting Marshall at an earlier age than most of the others. It has the features and shows the darkness of the hair and eyes with the prominence that his contemporaries uniformly ascribe to his appearance. But the attitude is stiff and conventional and the expression dull and commonplace. The countenance has neither the weight of character and benevolent dignity of the Inman portrait, nor even the lighter and more social expression of that by Harding.

dinner to him at which, as I have already related, Pinckney's famous answer to Talleyrand was put into its sententious popular form; here, in 1799, he took his seat in Congress as a member from Virginia, and, in announcing the death of Washington, crystallized his description into one immortal phrase; here, from time to time in his judicial labors, he so established himself in the affectionate respect of the bar that they, in happy testimonial, had his portrait painted by Henry Inman; here, from the press of a Philadelphia publisher, he sent forth that store-house of accurate and impartial history, the *Life of Washington*; here, to the pre-eminent skill of Philadelphia's physicians, he came in his old age for that relief from suffering which was so fortunately attained; and here, at the last, he came again when unhappily relief was beyond human skill, and on July 6, 1835, ended his long and honored life.

On the day following his death a meeting of the citizens was held, at which the venerable Bishop White, then in his eighty-eighth year, presided, and a meeting of the Bar appointed a committee, composed of some of its most eminent members, Judge Baldwin, John Sergeant, Richard Peters, Jr., William Rawle the younger, and Edward D. Ingraham, who accompanied the remains to their final resting place at Richmond.

The mayor and city officials escorted the body as far as New Castle, and as if to give the last connection with Philadelphia a final touch of pathetic sentiment, the venerated bell that had proclaimed liberty throughout the land unto all the inhabitants thereof tolled its last peal at his funeral.

On the invitation of the city councils, Horace Binney, a few months later, delivered that admirable eulogium to

which nothing since written has made any substantial addition. No tribute of affection and veneration was wanting that Philadelphia could pay, and that it might not be merely transitory the Bar subscribed a fund for a memorial which, after years of careful nursing and investment, resulted in the noble statue by Story, the lawyer-artist son of Marshall's admiring colleague, erected at the National Capital in our own day, with a memorable oration from one of our own Bar, the late William Henry Rawle.

By the uniform concurrence alike of contemporaries and posterity, we unhesitatingly claim for Marshall the foremost place in the list of eminent judges. Pinkney said, "He was born to be the Chief Justice of any country into which Providence should have cast him." The Bar of Charleston, never converts to his view of the Constitution, yet paid this tribute to the man in a resolution passed on hearing of his death: "Though his authority as Chief Justice of the United States was protracted far beyond the ordinary term of public life, no man dared to covet his place, or express a wish to see it filled by another. Even the spirit of party respected the unsullied purity of the judge, and the fame of the Chief Justice has justified the wisdom of the Constitution, and reconciled the jealousy of freedom to the independence of the judiciary." This tribute, specially eloquent from its source, is believed to have been drawn by the pen of the learned and patriotic Petigru, the bold and eminent figure who in his venerable age attested his fidelity to the principles of Marshall through all the terrible years of civil war by standing out alone and unyielding against the heresy of secession.

And more recently the keenest and best informed of transatlantic critics of American institutions has justly written:

“Another fact which makes the function of an American judge so momentous is the brevity, the laudable brevity, of the Constitution. The words of that instrument are general, laying down a few large principles. The cases which will arise as to the construction of these general words cannot be foreseen till they arise. When they do arise the generality of the words leaves open to the interpreting judges a far wider field than is afforded by ordinary statutes, which, since they treat of one particular subject, contain enactments comparatively minute and precise. Hence, although the duty of a court is only to interpret, the considerations affecting interpretation are more numerous than in the case of ordinary statutes, more delicate, larger in their reach and scope. They sometimes need the exercise not merely of legal acumen and judicial fairness, but of a comprehension of the nature and methods of government which one does not demand from the European judge who walks in the narrow path traced for him by ordinary statutes. It is therefore hardly an exaggeration to say that the American Constitution as it now stands, with the mass of fringing decisions which explain it, is a far more complete and finished instrument than it was when it came fire-new from the hands of the convention. It is not merely their work, but the work of the judges, and most of all of one man, the great Chief Justice Marshall.” (Bryce’s *Am. Commonwealth*.)

If we challenge the array of names in that country whose system has produced the historic exemplars of judicial greatness, where shall we find quite his equal? Not in Coke, prodigy of learning and relentless logic and



courageous asserter of judicial independence as he was, for he was narrow and technical in his law, illiberal and even vindictive in his personality. Let me not be misunderstood. I speak as a devoted and reverent disciple of the common law and of Coke as a master in it. But it is given to few men to be larger minded than their age, and it is no disparagement to Coke to say that he was not one of the few. Nor shall we find him in Ellesmere or Nottingham or Hardwicke, fathers of equity as they were, nor even in Mansfield, the first great master of technicalities, who yet saw through them all that the true vitality of the common law was its adaptability to the changing affairs of men. Great as these were, and they are the honored of the legal profession wherever their language is known, yet viewing the magnitude, breadth, variety and importance of his labors, or the ability with which he performed them, Marshall has had no equal, hardly a second.

The world's great man who helps to mold its history is he who, with great abilities, has great opportunities, and by his use of them produces great results. Tried by this exacting standard, in the light of his work as time has proved it, Marshall is the foremost in all the long line of judicial eminence.

A century and a decade have passed since the Constitution of the United States was adopted. Dynasties have risen and fallen; boundaries have expanded and shrunk till continents seemed almost the playthings of ambition and war; nationalities have been asserted and subdued; governments built up only to be overthrown, and the kingdoms of the earth from the Pillars of Hercules to the Yellow Sea have been shaken to their foundations. Through all this change and destruction, the Republic,

shortest lived of all forms of government in the prior history of the world, surviving the perils of foreign and domestic war, has endured and flourished. The band of union framed to hold together thirteen small communities fringing the Atlantic coast has expanded to unite forty-five States into a mighty nation of more than twenty times the population, spread from ocean to ocean over the breadth of the continent. That it has done this and is still adequate is due more than to any other one man to the great Chief Justice who defined its terms in such broad and wise and far-seeing and enduring form.

*Fortes ante Agamemnona*, said the Roman poet. There were great men before Agamemnon, there were just men before Aristides. But even as the Greeks cherished the name of Aristides the Just, and sent it down to the admiring centuries, so shall Americans cherish and send down to all time the name of John Marshall as the greatest of jurists. More fortunate than Aristides, no envious countryman was tired of hearing his praise while he lived, he shall be more fortunate in his fame as not only the just man, but the just judge.

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The celebration in Philadelphia was honored by the presence of a number of lineal descendants of Chief Justice Marshall, those accepting the invitation being Mrs. J. Harry Chesley, Miss Madge Marshall Chesley, Miss Claudia Dare Chesley, Miss Bessie Hall Chesley, Miss Etta Harry Chesley, of Claymont, Delaware; Mrs. Robert Wright Forsyth, Miss Charlotte Elizabeth Forsyth, Master Robert Wright Forsyth, Jr., Master Thomas Marshall Forsyth, Master Augustine Warner Lewis Forsyth, of Philadelphia.

Mrs. Chesley and Mrs. Forsyth are granddaughters of

Thomas Marshall, the eldest son of Chief Justice Marshall, and the Misses Chesley, Miss Forsyth and Masters Forsyth are the great-grandchildren of Thomas Marshall and the great-great-grandchildren of the Chief Justice.

An interesting feature of the John Marshall celebration was the exhibition in charge of the Legal Biography Committee of the Pennsylvania Bar Association, at its gallery and museum in the University of Pennsylvania Law Building. This consisted of a collection of valuable portraits of the great Chief Justice and his associates on the Bench; loan exhibitions of the Law Association of Philadelphia, of Hampton L. Carson, Charles Roberts and Alfred Percival Smith, Esqs., and the exhibit of the venerable Law Academy of Philadelphia.

Of all the organizations which united to honor the memory of Marshall, the Law Academy was the only one which existed as an active living body at the time Marshall received his appointment. The distinguished founder and patron of the Academy, Peter S. Duponceau, presided at the meeting of the Philadelphia Bar on the death of Marshall. Among the manuscripts was an autograph letter of his, accepting a re-election as Provost of the Academy; a minute-book referring to the constitution and by-laws adopted in 1783; the original copy of those adopted in 1806; printed copies of the numerous addresses prepared especially for the Law Academy from Duponceau's time to the present, and numerous other interesting manuscripts.

## STATE OF DELAWARE.

John Marshall Day was celebrated at a meeting of the Bar of the State of Delaware, held in the Supreme Court room of the State at an open session. Mr. Herbert H. Ward, the Attorney-General of the State, presented to the court a minute upon the life and achievements of Chief Justice Marshall. This was fittingly responded to by Chief Justice Lore. The minute and response were ordered spread upon the records.

Marshall Day was further celebrated by a dinner at the Clayton House in Wilmington, which was attended by members of the Bar of the State and city and by the Chief Justice, Charles B. Lore, by John R. Nicholson, Chancellor, and by Associate Justices Spruance, Grubb, Pennewill and Boyce, and also George Gray, the United States Circuit Judge, and Edward G. Bradford, District Judge of the United States for the District of Delaware. Besides the principal address below given, addresses were made by George Gray, James Pennewill, and by Levi C. Bird representing the New Castle County Bar, by Henry Ridgley, Jr., representing the Kent County Bar, and by Charles F. Richards, representing the Sussex County Bar.

The presiding officer, in introducing the principal speaker of the occasion, John Bassett Moore, spoke of him as a native of the State of Delaware, and fittingly referred to his public services as professor of International Law and Diplomacy at Columbia University, as Assistant Secretary of State, and to his History and Digest of International Arbitrations.

**Address of John Bassett Moore.<sup>1</sup>**

The celebration in which it is our privilege to-day to participate is in the main without example. The deeds of warriors, performed in times of great public excitement, produce by their immediate effects a profound impression on the popular imagination, and are commemorated in song and in story. The achievements of statesmen, wrought out in the tumult of public discussion, and often in the midst of armed conflict, lay hold on the general understanding and win immediate renown. But in the event which we are met to commemorate all these accessories were lacking. When, a hundred years ago, John Marshall assumed the office of Chief Justice of the United States, his advent was not acclaimed, nor was there anything in the time or the occasion that seemed to invest it with peculiar significance. Of his three predecessors, Jay, Rutledge and Ellsworth, the second, Rutledge, after sitting one term under a recess appointment, retired in consequence of his rejection by the Senate; and neither Jay nor Ellsworth, though both were men of high capacity, had found in their judicial station, the future importance of which was unforeseen, an opportunity for the full display of their powers, either of mind or of office. The coming of Marshall to the seat of justice marks the beginning of an era which is not yet ended, and which must endure so long as our system of government retains the essential features with which it was originally endowed. With him really began the process, peculiar to our American system, of the development of constitutional law by means of judicial decisions, based

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<sup>1</sup> This address was published in the *Political Science Quarterly* for September, 1901, vol. XVI, number 3, p. 393.

upon the provisions of a fundamental written instrument and designed for its exposition and enforcement. By the masterful exercise of this momentous jurisdiction, he profoundly affected the course of the national life and won the proud title of the Expounder of the Constitution of the United States. This great achievement has given him, as a judge, an exceptional place in the knowledge and the affections of the American people, so that his memory, though it yet remains in a special sense the treasure of the legal profession, is celebrated in the schools of the land and honored in the halls of legislation.

But while this particular achievement has caused Marshall to stand pre-eminent among judges, like Webster among statesmen, as the Expounder of the Constitution, and has brought him within the range of popular appreciation, yet it is not on this foundation alone that his fame as a jurist rests. In other departments of the law to which the jurisdiction of the Supreme Court extends, and especially in the department of the law of nations, he spread the rays of his illuminative genius. It was no mere spirit of encomium, but the spontaneous homage of a great advocate, who was not obliged by reason of any deficiencies of his own to withhold from any man a tribute of admiration, that led William Pinkney on a certain occasion to exclaim: "He was born to be the Chief Justice of any country in which he lived."

After the organization of the National Government, Marshall consistently supported the measures of Washington's administration, including the Jay treaty, and became a leader of the Federalist party, which, in spite of Washington's great personal hold on the people, was in a minority in Virginia. But he did not covet public office. He declined the position of Attorney-General of the

United States, which was offered to him by Washington, as well as the mission to France, as successor to Monroe. In 1797, however, at the special solicitation of President Adams, he accepted the post of envoy extraordinary and minister plenipotentiary to France, being associated in the mission with Charles Cotesworth Pinckney, of South Carolina, and Elbridge Gerry, of Massachusetts.

Few diplomatic enterprises have had so strange a history. When the plenipotentiaries arrived in Paris, the Directory was in the height of its power and Talleyrand was its minister of foreign affairs. He at first received the plenipotentiaries unofficially, but afterwards intimated to them, through his private secretary, that they could not have a public audience of the Directory till their negotiations were concluded. Meanwhile, they were waited upon by various persons, who represented that, in order to effect a settlement of the differences between the two countries, it would be necessary to place a sum of money at the disposal of Talleyrand, as a *douceur* for the ministers (except Merlin, the minister of justice, who was already making enough from the condemnation of vessels), and also to make a loan of money to the government. The plenipotentiaries, though they at first repulsed these suggestions, at length offered to send one of their number to America, to consult the government on the subject of a loan, provided that the Directory would in the meantime suspend proceedings against captured American vessels. This offer was not accepted; and the plenipotentiaries, after further conference with the French intermediaries, stated that they considered it degrading to their country to carry on further indirect intercourse, and that they had determined to receive no further propositions unless the persons who bore them

had authority to treat. In April, 1798, after spending in the French capital six months, during which they had with Talleyrand two unofficial interviews and exchanged with him an ineffectual correspondence, Pinckney and Marshall left Paris. Marshall was the first to return to the United States. On his arrival, he was greeted with remarkable demonstrations of respect and approval; for, although his mission was unsuccessful, he had powerfully assisted in maintaining a firm and dignified position in the negotiations.

On his return to the United States, Marshall resumed the practice of his profession; but soon afterwards, at the earnest entreaty of Washington, he became a candidate for Congress, declining for that purpose an appointment to the Supreme Court of the United States, as successor to Mr. Justice Wilson. He was elected after an exciting canvass, and in December, 1799, took his seat. He immediately assumed a leading place among the supporters of the administration, though on one occasion he exhibited his independence of mere party discipline by voting to repeal the obnoxious second section of the Sedition Law. But, of all the acts by which his course in Congress was distinguished, the most important was his defense of the administration in the case of Jonathan Robbins, *alias* Thomas Nash. By the twenty-seventh article of the Jay treaty it was provided that fugitives from justice should be delivered up for the offense of murder or of forgery. Under this stipulation Robbins, *alias* Nash, was charged with the commission of the crime of murder on board a British privateer on the high seas. He was arrested on a warrant issued upon the affidavit of the British consul at Charleston, South Carolina. After his arrest, an application was made to Judge Bee, sitting



in the United States Circuit Court at Charleston, for a writ of *habeas corpus*. While Robbins was in custody, the President of the United States, John Adams, addressed a note to Judge Bee, requesting and advising him, if it should appear that the evidence warranted it, to deliver the prisoner up to the representatives of the British government. The examination was held by Judge Bee, and Robbins was duly surrendered. It is an illustration of the vicissitudes of politics that, on the strength of this incident, the cry was raised that the President had caused the delivery up of an American citizen who had been impressed into the British service. For this charge there was no ground whatever, but it was made to serve the purposes of the day and was one of the causes of the popular antagonism to the administration of John Adams. When Congress met in December, 1799, a resolution was offered by Mr. Livingston, of New York, severely condemning the course of the administration. Its action was defended in the House of Representatives by Marshall, on two grounds: First, that the case was one clearly within the provisions of the treaty; and second, that, no act having been passed by Congress for the execution of the treaty, it was incumbent upon the President to carry it into effect by such means as happened to be within his power. The speech which Marshall delivered on that occasion is said to have been the only one that he ever revised for publication. It "at once placed him," as Mr. Justice Story has well said, "in the front rank of constitutional statesmen, silenced opposition, and settled forever the points of national law upon which the controversy hinged." So convincing was it that Mr. Gallatin, who had been requested by Mr. Livingston to reply, de-

clined to make the attempt, declaring the argument to be unanswerable.

In May, 1800, on the reorganization of President Adams's cabinet, Marshall unexpectedly received the appointment of Secretary of War. He declined it; but, the office of Secretary of State also having become vacant, he accepted that position, which he held till the 4th of the following March. Of his term as Secretary of State, which lasted less than ten months, little has been said; nor was it distinguished by any event of unusual importance, save the conclusion of the Convention with France of September 30, 1800, the negotiation of which, at Paris, was already in progress, under instructions given by his predecessor, when he entered the Department of State. The war between France and Great Britain, growing out of the French Revolution, was still going on. The questions with which he was required to deal were not new; and, while he exhibited in the discussion of them his usual strength and lucidity of argument, he had little opportunity to display a capacity for negotiation. Only a few of his State papers have been printed, nor are those that have not been published of special importance. He gave instructions to our Minister to Great Britain in relation to commercial restrictions, impressments and orders in council violative of the law of nations; to our Minister to France, in regard to the violations of neutral rights perpetrated by that government; and to our Minister to Spain, concerning infractions of international law committed, chiefly by French authorities, within the Spanish jurisdiction. Of these various State papers, the most notable was that which he addressed on September 20, 1800, to Rufus King, then United States Minister at London. Reviewing, in this instruction, the policy which

his government had pursued, and to which it still adhered, in the conflict between the European powers, he said:

"The United States do not hold themselves in any degree responsible to France or to Britain for their negotiations with the one or the other of these powers; but they are ready to make amicable and reasonable explanations with either. . . . It has been the object of the American Government, from the commencement of the present war, to preserve between the belligerent powers an exact neutrality. . . . The aggressions, sometimes of one and sometimes of another belligerent power, have forced us to contemplate and prepare for war as a probable event. We have repelled, and we will continue to repel, injuries not doubtful in their nature, and hostilities not to be misunderstood. But this is a situation of necessity, not of choice. It is one in which we are placed, not by our own acts, but by the acts of others, and which we [shall] change so soon as the conduct of others will permit us to change it."

For a month Marshall held both the office of Secretary of State and that of Chief Justice; but at the close of John Adams's administration he devoted himself exclusively to his judicial duties, never performing thereafter any other public service, save that late in life he acted as a member of the convention to revise the Constitution of Virginia. It is an interesting fact that, prior to his appointment as Chief Justice, Marshall had appeared only once before the Supreme Court, and on that occasion he was unsuccessful. This appearance was in the case of *Ware v. Hylton*,<sup>1</sup> which was a suit brought by a British creditor to compel the payment by a citizen of Virginia of a pre-Revolutionary debt, in conformity with

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<sup>1</sup> 8 Dallas, 192.

the stipulations of the treaty of peace. During the Revolutionary War various States, among which was Virginia, passed acts of sequestration and confiscation, by which it was provided that if the American debtor should pay into the State treasury the debt due to his British creditor, such payment should constitute an effectual plea in bar to a subsequent action for the recovery of the debt. When the representatives of the United States and Great Britain met at Paris to negotiate for peace, the question of the confiscated debts became a subject of controversy, especially in connection with that of the claims of the loyalists for the confiscation of their estates. Franklin and Jay, although they did not advocate the policy of confiscating debts, hesitated, chiefly on the ground of a want of authority in the existing National Government to override the acts of the States. But when John Adams arrived on the scene he delivered one of those dramatic strokes of which he was a master, and ended the discussion by suddenly declaring, in the presence of the British plenipotentiaries, that, so far as he was concerned, he "had no notion of cheating anybody;" that the question of paying debts and the question of compensating the loyalists were two; and that, while he was opposed to compensating the loyalists, he would agree to a stipulation to secure the payment of debts. It was therefore provided in the fourth article of the treaty that creditors on either side should meet with no lawful impediment to the recovery in full sterling money of *bona fide* debts contracted prior to the war. This stipulation is remarkable, not only as the embodiment of an enlightened policy, but also as perhaps the strongest assertion to be found in the acts of that time of the power and authority of the National Government. Indeed, when the British creditors, after

the establishment of peace, sought to proceed in the State courts, they found the treaty unavailing, since those tribunals held themselves still to be bound by the local statutes. In order to remove this difficulty, as well as to provide a rule for the future, there was inserted in the Constitution of the United States the clause declaring that treaties then made, or which should be made, under the authority of the United States, should be the supreme law of the land, binding on the judges in every State, anything in the Constitution or laws of any State to the contrary notwithstanding. On the strength of this provision the question of the debts was raised again, and was finally brought before the Supreme Court in the case of *Ware v. Hylton*. Marshall appeared for the State of Virginia, to oppose the collection of the debt. He based his contention on two grounds: First, that by the law of nations the confiscation of private debts was justifiable; second, that as the debt had, by the law of Virginia, been extinguished by its payment into the State treasury, and had thus ceased to be due, the stipulation of the treaty was inapplicable, since there could be no creditor without a debtor.

It is not strange that this argument was unsuccessful. While it doubtless was the best that the cause admitted, it may serve to illustrate the right of the suitor to have his case, no matter how weak it may be, fully and fairly presented for adjudication. On the question of the right of confiscation the judges differed, one holding that such a right existed, while another denied it, two doubted, and the fifth was silent. But as to the operation of the treaty, all but one agreed that it restored to the original creditor his right to sue, without regard to the validity or the invalidity of the Virginia statute.

When Marshall took his seat upon the bench, the Supreme Court, since its organization in 1790, had rendered only six decisions involving constitutional questions. From 1801 to 1835, in the thirty-four years during which he presided in that great tribunal, sixty-two such decisions were given, and in thirty-six of these the opinion of the court was written by Marshall. In the remaining twenty-six the preparation of the opinions was distributed among his associates, who numbered five before 1808, and after that date six. During the whole period of his service his dissenting opinions numbered eight, only one of which involved a constitutional question. Nor was the supremacy which this record indicates confined to questions of constitutional law. The reports of the court during Marshall's tenure fill thirty volumes, containing 1,215 cases. In ninety-four of these no opinions were filed, while fifteen were decided "by the court." In the remaining 1,106 cases the opinion of the court was delivered by Marshall in 519, or nearly one-half.<sup>1</sup>

No opportunity is afforded by the present occasion for an exposition of the questions of constitutional law decided by the Supreme Court during Marshall's term of service. Such an exposition would in reality involve a comprehensive examination of the foundations on which our constitutional system has been reared; and it is impracticable to do more than refer in the briefest terms to some of the leading cases. In one of his earliest opinions he established the vital principle that an act of Congress repugnant to the Constitution is void.<sup>2</sup> He defined the

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<sup>1</sup> Hitchcock, *The Development of the Constitution as influenced by Chief Justice Marshall*. (1889.)

<sup>2</sup> *Marbury v. Madison*, 1 Cranch, 187.

law of treason.<sup>1</sup> He declared the invalidity of State laws impairing the obligations of contracts,<sup>2</sup> while he affirmed the right of the States to pass insolvency laws, in the absence of the exercise by Congress of its power "to establish uniform laws on the subject of bankruptcies."<sup>3</sup> He upheld the supremacy of the judgments of the courts of the United States as against inconsistent State laws.<sup>4</sup> He maintained the authority of Congress to make all laws necessary and proper to carry into effect the powers vested by the Constitution in the government of the United States,<sup>5</sup> and, in the exercise of powers fairly implied, to incorporate a bank, free from the taxation, control or obstruction of any State.<sup>6</sup> He affirmed that the power of Congress to regulate commerce embraced all the various forms of intercourse, including navigation, and that "wherever commerce among the States goes, the judicial power of the United States goes to protect it from invasion by State legislatures."<sup>7</sup>

To the rule that Marshall's great constitutional opinions continue to be received as authority, perhaps the chief exception is that delivered in the Dartmouth College case,<sup>8</sup> the particular point of which — that acts of incorporation constitute contracts which the State legislatures

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<sup>1</sup> *Ex parte Bollman & Swartwout*, 4 Cranch, 75; *United States v. Aaron Burr*, *Ibid.*, App.

<sup>2</sup> *Fletcher v. Peck*, 6 Cranch, 87; *Dartmouth College v. Woodward*, 4 Wheat. 518.

<sup>3</sup> *Sturges v. Crowninshield*, 4 Wheat. 122.

<sup>4</sup> *United States v. Peters*, 5 Cranch, 186; *Cohens v. Virginia*, 6 Wheat. 264.

<sup>5</sup> *United States v. Fisher*, 2 Cranch, 358.

<sup>6</sup> *McCulloch v. Maryland*, 4 Wheat. 316, 431.

<sup>7</sup> *Gibbons v. Ogden*, 9 Wheat. 1; *Brown v. Maryland*, 12 Wheat. 419.

<sup>8</sup> *Dartmouth College v. Woodward*, 4 Wheat. 518.

can neither alter nor revoke — has been greatly limited by later decisions, while its effect has been generally obviated by express reservations of the right of amendment and repeal. With rare exceptions, however, his constitutional opinions not only remain unshaken, but continue to form the very warp and woof of the law, and “can scarcely perish but with the memory of the Constitution itself.” Nor should we, in estimating his achievements, lose sight of the almost uncontested ascendancy which he exercised, in matters of constitutional law, over the members of the tribunal in which he presided, in spite of what might have been supposed to be their predilections. When constitutional questions trench, as they often do, on the domain of statesmanship, it is natural, especially where precedents are lacking, that judges should divide upon them in accordance with the views of government maintained by the political parties with which they previously acted; and, after 1811, a majority of Marshall’s associates on the bench held their appointment from administrations of the party opposed to that to which he had belonged. This circumstance, however, does not appear to have disturbed the consistent and harmonious development of the system to which he was devoted; and it was in the second half of his term of service that many of the most important cases — such as *McCulloch v. Maryland*, *Cohens v. Virginia*, and *Gibbons v. Ogden*, in which he asserted the powers of the National Government — were decided.

But it is not alone upon his decisions on questions of constitutional law that Marshall’s fame as a judge rests. So marked was his supremacy in that domain, and so profoundly did his opinions affect the course of the National development, that we are accustomed to think of him in



the United States only as the expounder of the Constitution. This is not, however, his sole title to fame. He is known in other lands as the author of important opinions on questions which deeply concern the welfare and intercourse of all nations. In the treatment of questions of international law he exhibited the same traits of mind, the same breadth and originality of thought, the same power in discovering and the same certainty in applying fundamental principles that distinguished him in the realm of constitutional discussions; and it was his lot in more than one case to blaze the way in the establishment of rules of international conduct. During the period of his judicial service, decisions were rendered by the Supreme Court in one hundred and ninety-five cases involving questions of international law, or in some way affecting international relations. In eighty of these cases the opinion of the court was delivered by Marshall; in thirty-seven by Mr. Justice Story; in twenty-eight, by Mr. Justice Johnson; in nineteen, by Mr. Justice Washington; in fourteen, by Mr. Justice Livingston; in five, by Mr. Justice Thompson; and in one each, by Justices Baldwin, Cushing and Duvall. In eight the decision was rendered "by the court." In five cases Marshall dissented. As an evidence of the respect paid to his opinions by the publicists, the fact may be pointed out that Wheaton, in the first edition of his *Elements of International Law*, makes one hundred and fifty judicial citations, of which one hundred and five are English and forty-five American, the latter being mostly Marshall's. In the last edition he makes two hundred and fourteen similar citations, of which one hundred and thirty-five are English and seventy-nine American, the latter being largely Marshall's; and it is proper to add that one of the

distinctive marks of his last edition is the extensive incorporation into his text of the words of Marshall's opinions. Out of one hundred and ninety cases cited by Hall, a recent English publicist of pre-eminent merit, fifty-four are American, and in more than three-fifths of these the opinions are Marshall's.

One of the most far-reaching of all his opinions on questions of international law was that which he delivered in the case of the schooner *Exchange*, decided by the Supreme Court in 1812.<sup>1</sup> In preparing this opinion he was, as he declared, compelled to explore "an unbeaten path, with few, if any, aids from precedents or written laws;" for the status of a foreign man-of-war in a friendly port had not then been defined, even by the publicists. The "*Exchange*" was an American vessel, which had been captured and confiscated by the French under the *Rambouillet* decree, a decree which both the Executive and the Congress of the United States had declared to constitute a violation of the law of nations. She was afterwards converted by the French government into a man-of-war and commissioned under the name of the "*Balaou*." In this character she entered a port of the United States, where she was libeled by the original American owners for restitution. Reasoning by analogy, Marshall, in a remarkably luminous opinion, held that the vessel, as a French man-of-war, was not subject to the jurisdiction of the ordinary tribunals; and his opinion forms the basis of the law on the subject at the present day.<sup>2</sup>

By this decision the rightfulness or the wrongfulness

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<sup>1</sup> *Schooner Exchange v. McFaddon*, 7 Cranch, 116.

<sup>2</sup> This opinion was textually incorporated by Wheaton into his *Elements*, where it forms the statement of the law on various topics. Dana's *Wheaton*, pp. 154-162.

of the capture and condemnation of the "Exchange" was left to be determined by the two governments as a political question. In this respect Marshall maintained, as between the different departments of government, when dealing with questions of foreign affairs, a distinction which he afterwards sedulously preserved, confining the jurisdiction of the courts to judicial questions. Thus, he laid it down in the clearest terms that the recognition of national independence, or of belligerency, being in its nature a political act, belongs to the political branch of the government, and that in such matters the courts follow the political branch.<sup>1</sup> Referring on another occasion to a similar question, he said:

"In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. . . . If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied."<sup>2</sup>

He also asserted the right of the government to enlarge the national domain, saying:

"The Constitution confers absolutely on the government of the Union the power of making war and of making treaties; consequently, that government possesses the

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<sup>1</sup> *United States v. Palmer*, 8 Wheaton, 610; *The Divina Pastora*, 4 Wheaton, 52.

<sup>2</sup> *Foster v. Neilson*, 2 Pet. 253.

power of acquiring territory, either by conquest or by treaty.”<sup>1</sup>

But he held the rights of private property in such case to be inviolate.<sup>2</sup> The most luminous exposition of discovery as a source of title, and of the nature of Indian titles, is to be found in one of his opinions.<sup>3</sup>

A fundamental doctrine of international law is that of the equality of nations. If a clear and unequivocal expression of it be desired, it may be found in the opinion of Marshall in the case of *The Antelope*.<sup>4</sup>

“No nation [he declared] can make a law of nations. No principle is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights.”

The exemption from seizure and confiscation of the goods of a neutral on board of an armed vessel was maintained by him in the case of *The Nereide*.<sup>5</sup> When the representatives of the United States sought to establish at Geneva the liability of Great Britain for the depredations of the “Alabama” and other Confederate cruisers fitted out in British ports in violation of neutrality, one of the strongest authorities on which they relied was his opinion in the case of *The Gran Para*.<sup>6</sup>

In the decision of prize cases, Marshall, unlike some of his associates, was disposed to moderate the rigor of the English doctrines as laid down by Sir William Scott.

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<sup>1</sup> *Am. Ins. Co. v. Canter*, 1 Pet. 511.

<sup>2</sup> *Soulard v. United States*, 4 Pet. 511; *United States v. Percheman*, 7 Pet. 51; *Keene v. McDonough*, 8 Pet. 808.

<sup>3</sup> *Johnson v. McIntosh*, 8 Wheaton, 543.

<sup>4</sup> 10 Wheaton, 66; 11 Wheaton, 413.

<sup>5</sup> 9 Cranch, 388.

<sup>6</sup> 7 Wheaton, 471.

"I respect Sir William Scott [he declared on a certain occasion] as I do every truly great man; and I respect his decisions; nor should I depart from them on light grounds; but it is impossible to consider them attentively without perceiving that his mind leans strongly in favor of the captors."<sup>1</sup>

This liberal disposition, blended with independence of judgment, led Marshall to dissent from the decision of the court in two well-known cases. In one of these, which is cited by Phillimore as the "great case" of *The Venus*,<sup>2</sup> it was held that the property of an American citizen domiciled in a foreign country became, on the breaking out of war with that country, immediately confiscable as enemy's property, even though it was shipped before he had knowledge of the war. Marshall dissented, maintaining that a mere commercial domicile ought not to be presumed to continue longer than the state of peace, and that the fate of the property should depend upon the conduct of the owner after the outbreak of the war, in continuing to reside and trade in the enemy's country or in taking prompt measures to return to his own. In the other case—that of *The Commercen*<sup>3</sup>—he sought to disconnect the war in which Great Britain was engaged on the continent of Europe from that which she was carrying on with the United States, and to affirm the right of her Swedish ally to transport supplies to the British army in the Peninsula without infringing the duties of neutrality toward the United States. As to his opinion in the case of *The Venus*, Chancellor Kent

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<sup>1</sup> *The Venus*, 8 Cranch, 253, 299.

<sup>2</sup> 8 Cranch, 253.

<sup>3</sup> 1 Wheaton, 582.

declared that there was "no doubt of its superior solidity and justice;" and it must be admitted that his opinion in the case of *The Commercen* rested on strong logical grounds, since the United States and the allies of Great Britain in the war on the Continent never considered themselves as enemies.

It is not, however, by any means essential to Marshall's pre-eminence as a judge, to show that his numerous opinions are altogether free from error or inconsistency. In one interesting series of cases, relating to the power of a nation to enforce prohibitions of commerce by the seizure of foreign vessels outside territorial waters, the views which he originally expressed, in favor of the existence of such a right,<sup>1</sup> appear to have undergone a marked, if not radical, change in favor of the wise and salutary exemption of ships from visitation and search on the high seas in time of peace<sup>2</sup>—a principle which he affirmed on more than one occasion.<sup>3</sup> In the reasoning of another case, though not in its result, we may perhaps discern traces of the preconceptions formed by the advocate in the argument concerning the British debts.<sup>4</sup> This was the case of *Brown v. United States*,<sup>5</sup> which involved the

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<sup>1</sup> *Church v. Hubbard*, 3 Cranch, 187.

<sup>2</sup> *Rose v. Himely*, 4 Cranch, 241. It was argued by Mr. E. J. Phelps, in the *Fur Seal Arbitration*, that the views expressed by Marshall in *Church v. Hubbard*, 3 Cranch, 187, were adopted by the Supreme Court in *Hudson v. Guestier*, 6 Cranch, 281. The latter case, however, merely decided that the sentence of a foreign court is conclusive as to the property condemned by it, and that it is not in this respect judicially reviewable by the court of another country. Marshall did not concur in this decision.

<sup>3</sup> *The Antelope*, 10 Wheaton, 66.

<sup>4</sup> *Supra*, p. 516.

<sup>5</sup> 8 Cranch, 110.

question of the confiscability of the private property of an enemy on land, by judicial proceedings, in the absence of an act of Congress expressly authorizing such proceedings. On the theory that war renders all property of the enemy liable to confiscation, Mr. Justice Story, with the concurrence of one other member of the court, maintained that the act of Congress declaring war of itself gave ample authority for the purpose. The majority held otherwise, and Marshall delivered the opinion. Referring to the practice of nations and the writings of publicists, he declared that, according to "the modern rule," "tangible property belonging to an enemy and found in the country at the commencement of war ought not to be immediately confiscated;" that "this rule" seemed to be "totally incompatible with the idea that war does of itself vest the property in the belligerent government;" and, consequently, that the declaration of war did not authorize the confiscation. Since effect was thus given to the modern usage of nations, it was unnecessary to declare, as he did in the course of his opinion, that "war gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found," and that the "mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice," though they "will more or less affect the exercise of this right," "cannot impair the right itself." Nor were the two declarations quite consistent. The supposition that usage may render unlawful the exercise of a right, but cannot impair the right itself, is at variance with sound theory. Between the effect of usage on rights and on the exercise of rights, the law draws no precise distinction. A right derived

from custom acquires no immutability or immunity from the fact that the practices out of which it grew were ancient and barbarous. We may, therefore, ascribe the dictum in question to the influence of preconceptions, and turn for the true theory of the law to an opinion of the same great judge, delivered twenty years later, in which he denied the right of the conqueror to confiscate private property, on the ground that it would violate "the modern usage of nations, which has become law."<sup>1</sup>

United with extraordinary powers of mind we find in Marshall the greatest simplicity of life and character. In this union of simplicity and strength he illustrated the characteristics of the earlier period of our history. He has often been compared with the great judges of other countries. He has been compared with Lord Mansfield; and, although he did not possess the extensive learning and elegant accomplishments of that renowned jurist, the comparison is not inappropriate when we consider their breadth of understanding and powers of reasoning; and yet Mansfield, as a member of the House of Lords, defending the prerogatives of the Crown and Parliament, and Marshall, as an American patriot, sword in hand, resisting in the field the assumptions of imperial power, represent opposite conceptions. He has been compared with Lord Eldon; and it may be that in fineness of discrimination and delicate perceptions of equity he was excelled by that famous Lord Chancellor; and yet no greater contrast could be afforded than that of Eldon's uncertainty and procrastination on the bench with Marshall's bold and masterful readiness. He has been compared with Lord Stowell; and it may be con-

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<sup>1</sup> *United States v. Percheman*, 7 Peters, 51.



